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Supreme Court, U.S.
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No. 15-___

IN THE

Supreme Court of the United States

ROBERT F MCDONNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Under the federal bribery statute, Hobbs Act, and honest-services fraud statute, 18 U.S.C. §§ 201, 1346, 1951, it is a felony to agree to take "official action" in exchange for money, campaign contributions, or any other thing of value. The question presented is whether "official action" is limited to exercising actual governmental power, threatening to exercise such power, or pressuring others to exercise such power, and whether the jury must be so instructed; or, if not so limited, whether the Hobbs Act and honest-services fraud statute are unconstitutional.

II. In *Skilling v. United States*, this Court held that juror screening and *voir dire* are the primary means of guarding a defendant's right to an impartial jury against the taint of pretrial publicity. 561 U.S. 358, 388-89 (2010). The question presented is whether a trial court must ask potential jurors who admit exposure to pretrial publicity whether they have formed opinions about the defendant's guilt based on that exposure and allow or conduct sufficient questioning to uncover bias, or whether courts may instead rely on those jurors' collective expression that they can be fair.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 10

I. THE MEANING OF "OFFICIAL ACTION" MERITS THIS COURT'S REVIEW 11

A. The Opinion Below Conflicts With Multiple Decisions From This Court 12

B. The Opinion Below Conflicts With Three Other Circuits 18

C. The Opinion Below Criminalizes Ordinary Politics, Turning Nearly Every Elected Official Into A Felon 27

II. THE PRETRIAL PUBLICITY ISSUE ALSO MERITS THIS COURT'S REVIEW 30

A. The Panel Endorsed Inadequate *Voir Dire* Of Publicity-Exposed Jurors 30

B. The Decision Below Conflicts With Decisions Of This Court And Multiple Other Circuits 32

C. This Is An Increasingly Important Issue Worthy Of The Court's Review 36

TABLE OF CONTENTS
(continued)

Page

CONCLUSION 36

APPENDIX A: Opinion of the United States Court of Appeals for the Fourth Circuit (July 10, 2015) 1a

APPENDIX B: Memorandum Opinion of the United States District Court for the Eastern District of Virginia (December 1, 2014) 80a

APPENDIX C: Fourth Circuit Order Denying Motion to Stay the Mandate (August 20, 2015) .. 115a

APPENDIX D: Fourth Circuit Order Granting Appellant's Motion for Release Pending Appeal (January 26, 2015) 117a

APPENDIX E: Amended Judgment of the United States District Court for the Eastern District of Virginia (January 6, 2015) 119a

APPENDIX F: Memorandum Order of the United States District Court for the Eastern District of Virginia (January 13, 2015) 130a

APPENDIX G: Fourth Circuit Order Denying Petition for Rehearing En Banc (August 11, 2015) 135a

APPENDIX H: Relevant Statutes 137a

18 U.S.C. § 201 ..... 137a

18 U.S.C. § 1346 ..... 142a

18 U.S.C. § 1951 ..... 143a

APPENDIX I: Robert F. McDonnell's Proposed Jury Instructions (June 25, 2015) 145a

TABLE OF CONTENTS
(continued)

Page

APPENDIX J: Joint Proposed Jury Questionnaire 150a

APPENDIX K: Individual Follow Up Questions for Jurors with any Pre-Trial Exposure 151a

APPENDIX L: Jury Trial – Volume I Transcript Excerpts (July 28, 2014) 155a

APPENDIX M: Jury Trial – Volume II Transcript Excerpts (July 29, 2014) 173a

APPENDIX N: Jury Trial – Volume IV Transcript Excerpts (July 31, 2014) 176a

APPENDIX O: Jury Trial – Volume VII Transcript Excerpts (August 5, 2014)..... 189a

APPENDIX P: Jury Trial – Volume VIII Transcript Excerpts (August 6, 2014)..... 212a

APPENDIX Q: Jury Trial – Volume X Transcript Excerpts (August 8, 2014)..... 220a

APPENDIX R: Jury Trial – Volume XIX Transcript Excerpts (August 21, 2014)..... 242a

APPENDIX S: Jury Trial – Volume XXIV Transcript Excerpts (August 28, 2014)..... 249a

APPENDIX T: Jury Trial – Volume XXV Transcript Excerpts (August 29, 2014)..... 259a

APPENDIX U: Jury Trial – Volume XXVI Transcript Excerpts (September 2, 2014)..... 271a

TABLE OF AUTHORITIES

Page(s)

CASES

Bond v. United States,
134 S. Ct. 2077 (2014) 15, 16

Citizens United v. FEC,
558 U.S. 310 (2010) 14, 15, 25

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 15

Evans v. United States,
504 U.S. 255 (1992) 11, 14

Irvin v. Dowd,
366 U.S. 717 (1961) 33

Jordan v. Lippman,
763 F.2d 1265 (11th Cir. 1985) 35

McConnell v. FEC,
540 U.S. 93 (2003) 13, 28

McCutcheon v. FEC,
134 S. Ct. 1434 (2014) 14

McNally v. United States,
483 U.S. 350 (1987) 17

Mu'Min v. Virginia,
500 U.S. 415 (1991) 32

TABLE OF AUTHORITIES
(continued)

Page(s)

Murphy v. Florida,
421 U.S. 794 (1975) 33

Patriarca v. United States,
402 F.2d 314 (1st Cir. 1968) 34

Patton v. Yount,
467 U.S. 1025 (1984) 32

Pruett v. Norris,
153 F.3d 579 (8th Cir. 1998) 33

Silverthorne v. United States,
400 F.2d 627 (9th Cir. 1968) 35

Skilling v. United States,
561 U.S. 358 (2010) 11, 15, 17, 33

United States ex rel. Bloeth v. Denno,
313 F.2d 364 (2d Cir. 1963) 34, 35

United States v. Dellinger,
472 F.2d 340 (7th Cir. 1972) 33, 35

United States v. Loftus,
992 F.2d 793 (8th Cir. 1993) ..... *passim*

United States v. Lopez,
514 U.S. 549 (1995) 17

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Menendez,
No. 15-155, 2015 U.S. Dist. LEXIS
129850 (D.N.J. Sept. 28, 2015) 28

United States v. Pratt,
728 F.3d 463 (5th Cir. 2013) 33, 34

United States v. Rabbitt,
583 F.2d 1014 (8th Cir. 1978) 18, 21, 22, 24

United States v. Rahman,
189 F.3d 88 (2d Cir. 1999) 32

United States v. Rhodes,
556 F.2d 599 (1st Cir. 1977) 34

United States v. Ring,
706 F.3d 460 (D.C. Cir. 2013) 20, 22, 24, 25

United States v. Sun-Diamond Growers
of Cal.,
526 U.S. 398 (1999) ..... *passim*

United States v. Urciuoli,
513 F.3d 290 (1st Cir. 2008) ..... *passim*

Valdes v. United States,
475 F.3d 1319 (D.C. Cir. 2007) 16, 20, 22, 24

Waldorf v. Shuta,
3 F.3d 705 (3d Cir. 1993) 35

TABLE OF AUTHORITIES
(continued)

Page(s)

Yates v. United States,
135 S. Ct. 1074 (2015) 15

STATUTES

18 U.S.C. § 201 ..... 5, 11, 16

18 U.S.C. § 1346 11

28 U.S.C. § 1254(1) 1

Va. Code § 2.2-3103(8)-(9) 16

OTHER AUTHORITIES

4th Cir. R. 35 10

$18,000 Vacation Puts Kaine Atop Gift Recipients List, WASH. TIMES, Feb. 4, 2006 17

Bob Bauer, *The Judging of Politicians—By Judges*, MORE SOFT MONEY HARD LAW, July 14, 2015 29

Josh Gerstein, *Why John Edwards Won and Bob McDonnell Lost*, POLITICO, Sept. 5, 2014 26

Peter Nicholas, *Administration Officials Double as Obama Campaign Speakers*, L.A. TIMES, Nov. 16, 2011 29

TABLE OF AUTHORITIES
(continued)

Page(s)

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OPINIONS BELOW

The Fourth Circuit's opinion (App.1a) is at 792 F.3d 478. The district court's opinion denying a new trial (App.80a) is at 64 F Supp. 3d 783, while its opinion denying acquittal is at 2014 WL 6772486.

JURISDICTION

The Fourth Circuit entered judgment on July 10, 2015, and denied rehearing on August 11, 2015. App.136a. 28 U.S.C. § 1254(1) confers jurisdiction.

PROVISIONS INVOLVED

Relevant statutory provisions are at App.137a.

STATEMENT

Robert F. McDonnell is a former Virginia Governor, retired U.S. Army officer, and lifelong public servant who was convicted on federal corruption charges based on the theory that he accepted otherwise-lawful gifts and loans in exchange for taking five supposedly "official acts." Yet those five acts—as alleged in the indictment, argued to the jury, and relied on by the courts below—were limited to routine political courtesies: arranging meetings, asking questions, and attending events. There is no dispute that Gov. McDonnell never exercised any governmental power on behalf of his benefactor, promised to do so, or pressured others to do so. Indeed, the only staffer to meet with the alleged bribe-payor during the supposed conspiracy testified that Gov. McDonnell never "interfere[d]" with her office's "decision-making process." App.203a. The courts below nonetheless reasoned that arranging a meeting to discuss a policy issue, or inquiring about it, is itself "official" action "on" that issue—even if the

official never directs any substantive decision. Moreover, the jury was never instructed that, to convict, it needed to find that Gov. McDonnell exercised (or pressured others to exercise) any governmental power. But the panel upheld the instructions as "adequat[e]" because they quoted a statute, while adding a host of improper elaborations that the Government aggressively exploited.

This is the first time in our history that a public official has been convicted of corruption despite never agreeing to put a thumb on the scales of any government decision. Officials routinely arrange meetings for donors, take their calls, and politely listen to their ideas. By affirming the convictions and endorsing the instructions below, the Fourth Circuit construed "official action" so broadly that it made these commonplace actions federal felonies whenever a jury infers a link to the donor's contributions. That dramatic expansion of three corruption statutes conflicts with this Court's decisions, decisions in three other Circuits, and common sense.

Moreover, although Gov. McDonnell's prosecution was preceded by a barrage of inflammatory and misleading media coverage that nearly all potential jurors admitted seeing, the district court repeatedly refused to ask them the most basic question: had they already formed opinions about Gov. McDonnell's guilt as a result? Instead, the court collectively asked 142 potential jurors to stand if they had heard about the case and sit if they felt they could "be fair." Almost all stood; unsurprisingly, all sat. The panel upheld that perfunctory process—of "merely asking for a show of hands" (App.31a)—in conflict with authority from this Court and other Circuits.

1. The Government's case centered around Gov. McDonnell's interactions with Jonnie R. Williams, Sr., the CEO of a Virginia-based public company, Star Scientific ("Star"). Neither Williams nor Star received "a dime of state money" or any other state benefit. App.175a. Nor did Gov. McDonnell pressure anyone to give Williams state benefits, or promise Williams he would help him obtain such benefits. Rather, as the district court found, the prosecution hinged on the following "five specific actions taken by McDonnell" and their temporal proximity to otherwise-lawful loans and gifts from Williams (including golf at his club), App.87a:

(1) Williams and some people he recommended (along with hundreds of others) were invited to a cocktail reception for "Healthcare Leaders." It was undisputed that no official business was discussed at that party. App.186a-188a, 219a.

(2) Gov. McDonnell emailed his chief counsel, Jason Eige, asking Eige to "see me" about Star research studies. Nobody could remember whether Eige actually "saw" him, but it was undisputed that Eige never did anything to try to obtain studies, and Eige testified that Gov. McDonnell "never followed back up with me or never pushed back or never directed me to actually go forward and try to make something happen with the universities." App.210a-211a.

(3) Gov. McDonnell suggested two subordinates meet with Star, noting that its product might be good for state employees. It was undisputed that they never took up that suggestion. App.225a-226a, 230a-231a, 234a-236a.

(4) Gov. McDonnell asked a subordinate to send a staffer to meet with Williams, after which the staffer sent Williams an undisputed "blow-off email." App.201a (characterizing this email as "'No' with a smile."), 198a-199a.

(5) Gov. McDonnell appeared at a lunch at the Executive Mansion (*i.e.*, his home), paid for by his PAC, at which Williams presented checks from Star to state university researchers, as planning grants to prepare research proposals to study a Star product. At the event, Gov. McDonnell asked the researchers whether the studies would be good for Virginia. It was undisputed that no proposals were ever submitted and that his Administration never contacted the researchers or universities. App.178a-179a, 183a-185a, 215a-218a.

Gov. McDonnell repeatedly argued that these acts did not qualify as "official" ones because he did not take, or pressure anyone to take, any action on any governmental matter. He also requested jury instructions reflecting this principle, including that "merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, 'official acts'"; that "you must decide ... whether that conduct was intended to or did in fact influence a specific official decision the government actually makes"; and that "mere ingratiation and access are not corruption." App.146a-147a; App.251a-257a.

The district court refused these requests to limit "official action." Instead, it quoted the definition of "official act" from the separate bribery law governing

federal officials—"decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity," 18 U.S.C. § 201(a)(3)—and added:

> Official action as I just defined it includes those actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law. In other words, official actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description. And a public official need not have actual or final authority over the end result sought by a bribe payor so long as the alleged bribe payor reasonably believes that the public official had influence, power or authority over a means to the end sought by the bribe payor. In addition, official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.

App.275a.

The Government capitalized on this expansive language in its closing. It ridiculed the notion that taking official action requires pressuring others for governmental action: "They keep on talking about no one was pressured. When you get these jury instructions, ladies and gentlemen, you look for the

word pressure. It doesn't appear anywhere." App.268a. It continued: "[Counsel] talked about defining quo. ... But what he failed to mention is that official action ... includes those actions that have been clearly established by settled practice as part of a public official's position." App.265a. Because anything could be part of "a series of steps to exercise influence," as the jury was instructed, App.275a, prosecutors argued that if Gov. McDonnell posed for "photos" or "ma[de] comments at ... ribbon cuttings" in exchange for money, "it's a crime," App.264a. "Whatever it was, it's all official action." App.263a.

The jury convicted Gov. McDonnell on all 11 corruption counts. Because the jury was not instructed to identify, or reach unanimity on, which acts it found to be "official," the jury could have convicted based on any one of the five acts. App.257a-258a (proposing unanimity instruction). As the Government told the jury, "any one of those [acts] is sufficient" to convict. App.268a.

2. Gov. McDonnell's trial followed an onslaught of prejudicial pretrial publicity. Despite the requirement of grand jury secrecy, publicity began shortly after prosecutors convened a grand jury in spring 2013. Improper disclosures fed a 16-month pretrial barrage of negative articles, TV and radio spots, and social-media posts. After the indictment, wall-to-wall coverage ensued, condemning Gov. McDonnell in harsh and inaccurate terms. *See* D.Ct. Dkt. 110 at 2-12; D.Ct. Dkt. 518-1 (compilation).

In light of this overwhelming negative pretrial publicity, Gov. McDonnell and the Government jointly requested individual *voir dire* of jurors who

had heard about the case. App.157a-159a. The district court refused. *Id.* Instead, it limited oral *voir dire* on pretrial publicity to two questions. After acknowledging "a lot of media interest," the court asked the 142 prospective jurors to stand up "if you have read, heard or seen something in the media." App.160a. Almost all stood. The court then asked whether, "[b]ased on what you have heard or read or seen relating to this case, if you are, in your mind, able to put aside whatever it is that you've heard, listen to the evidence in this case and be fair to both sides, then I want you to sit down." *Id.* Everyone sat. *Id.* The court announced it was "satisfied with ... the responses," and—over repeated objections—declined to inquire further. App.160a-161a.

The district court did individually *voir dire* a few potential jurors whose answers to other questions on a jury questionnaire gave rise to concern. But critically, it refused to include any question—despite the parties' joint request, App.150a—asking whether prospective jurors had formed opinions about guilt. Indeed, the court repeatedly rejected defense requests that this question be posed to the jury pool. App.150a, 151a-153a, 159a. The court allowed only a question asking whether potential jurors had *expressed* an opinion about the case to others. App.29a. Gov. McDonnell thus still does not know whether any of the publicity-exposed jurors who voted to convict had pre-formed opinions about guilt.

3. The district court denied motions for acquittal or a new trial. It agreed that the verdict's validity "hinges on the interpretation of an 'official act.'" App.84a. Yet, to distinguish "official" acts (criminal if part of a *quid pro quo*) from acts that are not "official"

(not criminal *even if* part of a *quid pro quo*), the court circularly ruled that it "look[s] to whether a quid pro quo agreement existed." *Id.* Recognizing that there was no direct evidence of any *quid pro quo* agreement, the court ruled that the jury could *infer* one based on "the timing of Williams' gifts" vis-a-vis Gov. McDonnell's "five specific actions"—*i.e.*, attending events and arranging meetings—things Gov. McDonnell "customarily" did. App.87a-89a.

The district court sentenced Gov. McDonnell to two years in prison, App.123a, and then denied him bond pending appeal, App.130a-134a.

4. Recognizing that Gov. McDonnell's appeal presented "substantial" questions, the Fourth Circuit granted him release pending appeal. App.118a.

On July 10, 2015, the panel (Judges Motz, King, and Thacker) rejected Gov. McDonnell's arguments. The court held that Gov. McDonnell's acts—which it described as "asking a staffer to attend a briefing, questioning a university researcher at a product launch, and directing a policy advisor to 'see' him about an issue"—were "official acts" allowing conviction. App.73a. By affirming the jury's general verdict, the panel necessarily held that all five of Gov. McDonnell's acts were "official." In its view, each was action "on" the question whether state universities or agencies should conduct or fund studies of Star's product, because that request by Williams was a topic of the meetings and questions. App.73a-74a. It did not matter that Gov. McDonnell never directed—or even requested—that studies be done (which is, of course, why no studies happened). It was sufficient that he took steps to gather

information about the issue through meetings, inquiries to aides, and questions to researchers. *Id.* On the Fourth Circuit's unprecedented theory, those prefatory, information-gathering acts themselves "exploited" state power "to influence the work of state university researchers." App.73a.

Moreover, the jury was never told it had to find any effort by Gov. McDonnell to "exercise the actual regulatory power of the state" or "influence" governmental decisions, despite the defense seeking precisely such instructions. App.146a-147a; App.251a-257a. Yet the panel held that the instructions "adequately delineated" the meaning of "official act" because they quoted the statutory definition from the bribery statute governing federal officials. App.49a. The panel further blessed all of the district court's expansions of that definition—including to all acts an official "customarily performs," those "in furtherance of longer-term goals," and anything that is "one in a series of steps to ... achieve an end." App.62a. And the panel also affirmed the court's refusal to place any limits on "official action," including proposed instructions drawn directly from decisions of this Court and other Circuits. App.47a-65a.

As to pretrial publicity, the panel upheld, as within the district court's discretion, its refusal to ask whether publicity-exposed jurors had formed opinions about guilt, deeming the brief stand-up-sit-down routine "adequate." App.32a.

5. Gov. McDonnell sought rehearing en banc. A poll was requested, but seven of the Circuit's fifteen active judges recused, meaning that the votes of all

five remaining judges not on the original panel were required to grant the petition. 4th Cir. R. 35(b). The petition was denied. App.136a. The original panel then refused to stay its mandate pending a certiorari petition. App.116a.

6. Petitioner sought relief from this Court, filing an application to stay the mandate pending this certiorari petition. The Government opposed, noting that such relief would be warranted only if this Court were "likely to grant a writ of certiorari and reverse." Stay Opp'n 17, *McDonnell v. United States* (No. 15A218). The Chief Justice referred Gov McDonnell's application to the Court, which granted it without noted dissent. Order, *McDonnell v. United States*, Aug. 31, 2015 (No. 15A218).

REASONS FOR GRANTING THE PETITION

This petition presents two questions meriting review. *First*, the courts below adopted an unprecedented and erroneous construction of "official action" under the federal corruption laws, expanding those laws to reach any official who so much as takes a phone call from a donor, and any donor who places such a call. That holding conflicts with decisions of this Court and three other Courts of Appeals, while threatening to criminalize politics in America. *Second*, the Fourth Circuit approved a deficient *voir dire* process that this Court's decisions have foreclosed for decades and seven other Circuits have rejected. That holding presents an issue of vital importance in the modern era of pervasive, sensationalist media coverage—necessitating this Court's clarification of the essential elements of *voir dire* in cases involving prejudicial pretrial publicity.

I. THE MEANING OF "OFFICIAL ACTION" MERITS THIS COURT'S REVIEW.

The federal bribery statute, honest-services fraud statute, and Hobbs Act prohibit exchanging "official action" for money, campaign contributions, or other things of value.[1] This case turns on the scope of that critical phrase, as the district court and Fourth Circuit recognized. App.47a, 69a, 84a.

Specifically, does an official take "official action" by "asking a staffer to attend a briefing, questioning a university researcher at a product launch, and directing a policy advisor to 'see' him about an issue," App.73a—even without exercising or pressuring others to exercise any governmental power? The decision below is the first ever to conclude that these ubiquitous actions are "official" ones that can turn a devoted public servant into a felon. The Fourth Circuit held that even asking an aide to hear out a constituent's request—the most basic of political duties—is *itself* an "official act" on that request. That means a jury could infer a criminal *quid pro quo* whenever an official arranges a staff meeting for a donor, something officials reflexively do all the time. That unbounded construction—which was imparted to the jury, and without which there was insufficient evidence to convict—flies in the face of decisions of this Court and the three other Circuits to consider it.

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[1] The phrase "official act" appears in the federal bribery statute (18 U.S.C. § 201), which applies only to federal officials. As narrowed by *Skilling*, the honest-services statute (18 U.S.C. § 1346) proscribes "bribes" and "draws content" from the federal bribery statute. 561 U.S. 358, 412 (2010). And under *Evans v. United States*, a bribe for "official acts" also violates the Hobbs Act. *See* 504 U.S. 255, 260, 267-68 & n.18 (1992).

And by making a potential felon of every politician who provides "access" to donors, it vests prosecutors with a frightening degree of control over the political process. This wholesale reinvention of federal corruption law manifestly merits review.

A. The Opinion Below Conflicts With Multiple Decisions From This Court.

On both its specific construction of "official act" (divorced from any exercise of governmental power) and its general approach to the federal corruption statutes (adopting a broad and vague interpretation), the opinion below contradicts this Court's decisions.

1. In discussing the meaning of "official action" in *United States v. Sun-Diamond Growers of California*, this Court emphasized the need to construe that phrase narrowly lest it criminalize routine conduct. 526 U.S. 398, 408 (1999). Unanimously rejecting the Government's construction, the Court explained it would lead to "absurdities." *Id.* "It would criminalize ... the replica jerseys given [to the President] by championship sports teams each year during ceremonial White House visits," "a high school principal's gift of a school baseball cap to the Secretary of Education ... on the occasion of the latter's visit," and "providing a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to [] farmers concerning various matters of USDA policy." *Id.* at 406-07. Even if those gifts were in exchange "for" those actions, they are not crimes: Such acts—"while they are assuredly 'official acts' in some sense—are not 'official acts' within the meaning of the statute." *Id.* at 407. That is because none exercise actual governmental power.

Nor do the acts the Fourth Circuit held criminal—asking questions, arranging meetings, and making introductions. If asking a question about the prospect of research studies counts as an action "on" the matter whether to conduct the studies, then the Agriculture Secretary's speech to farmers about "matters of USDA policy" is likewise an action "on" those matters, making his receipt of lunch in exchange for the speech a felony. *But see Sun-Diamond*, 526 U.S. at 406-07 Nor was the jury ever instructed on *Sun-Diamond*'s critical lesson, *i.e.*, that some acts are official "in some sense," yet not "within the meaning of the statute." *Id.* at 407

The panel sought to distinguish what it called "dicta" in *Sun-Diamond* on the ground that the acts *Sun-Diamond* described are "strictly ceremonial or educational" and thus "rarely" cross the criminal line. App.54a-55a. But that dichotomy is nowhere in this Court's opinion. It is also wrong. An Agriculture Secretary "*always* has before him or in prospect matters that affect farmers." *Sun-Diamond*, 526 U.S. at 407. Thus, on the panel's reasoning, if instead of speaking to farmers, the Secretary participated in a "roundtable" to listen to their policy views—a common practice, *see, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 130 (2003) (describing donor programs that "promised 'special access to high-ranking ... elected officials")—then his acceptance of lunch *would* be criminal. It would be in conjunction with action "on" the policies discussed because, on the panel's view, that discussion would "have the purpose or effect of exerting some influence on those policies." App.54a. Or, if a mayor visited a school and asked students questions about their desire for increased school

funding, his acceptance of a cap *would* be a crime—given to him for his action "on" school funding. Those consequences of the Fourth Circuit's holding are no less "absur[d]" than the acts *Sun-Diamond* listed.

2. Not only has this Court held that actions like a visit, speech, or meeting are not, standing alone, "official acts," it has even held that paying for such "access"—through campaign contributions or independent expenditures—is constitutionally protected. While the government can forbid true corruption—*i.e.*, the "direct exchange of an official act for money"—it "may not target ... the political access such [financial] support may afford." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014). Rather, only payments "to control the exercise of an officeholder's official duties" warrant intervention. *Id.* at 1450. That is because "[i]ngratiation and access ... are not corruption." *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

In other words, paying for "access"—the ability to a get a call answered or a meeting scheduled—is constitutionally protected and an intrinsic part of our political system. *McCutcheon*, 134 S. Ct. at 1450-51. Yet Gov. McDonnell was convicted for, at worst, providing just that. Campaign donations, no less than gifts, can serve as *quid* in a forbidden exchange. *See Evans*, 504 U.S. 255. The opinion below thus conjures a federal felony out of what this Court has held to be a fundamental constitutional right.

The panel responded that *Citizens United* is "a campaign-finance case," which "involved neither the honest-services statute nor the Hobbs Act." App.64a. True. But the First Amendment principles it invoked

are no less applicable to penal statutes. Moreover, *Citizens United* was decided the same Term as *Skilling v. United States*, in which this Court saved the honest-services statute from unconstitutionality by limiting it to its "bribe-and-kickback *core*." 561 U.S. at 409 (emphasis added). (Three Justices still would have invalidated the law. *Id.* at 415 (Scalia, Thomas, Kennedy, JJ. concurring in judgment).) By now interpreting that same statute to criminalize the very purchasing of "access" that *Citizens United* held cannot be constitutionally proscribed, the decision below makes a mockery of *Skilling*'s limitation to "core" bribery. If Gov. McDonnell can be imprisoned for giving routine access to a gift-giver, any official could equally be imprisoned for agreeing to answer a donor's phone call about a policy issue.

3. The panel's expansive definition of "official act" is also contrary to this Court's teachings about *how* to construe vague corruption laws. Numerous canons of construction require interpreting these statutes narrowly—including the rule of lenity, *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015); the federalism canon, *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014); and constitutional avoidance, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). As *Sun-Diamond* summarized: "[A] statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." 526 U.S. at 412. Here, the panel's interpretation is not a "meat axe"; it is a chainsaw. It contravenes all of these principles.

First, the statutes at issue do not *unambiguously* encompass acts that neither take nor even urge

governmental action. The Hobbs Act and honest-services statute do not use the term "official act" at all; the Fourth Circuit borrowed that term from the statute governing federal officials, 18 U.S.C. § 201(b), and then gave it the broadest construction ever articulated. Further, that statutory definition requires that officials take action "on" a "question" or "matter" "whose answer or disposition is determined by the government." *Valdes v. United States*, 475 F.3d 1319, 1324 (D.C. Cir. 2007) (en banc). It is not enough to take action *pertaining* to a *general* matter; the official must act *"on"* a *specific governmental* matter—*i.e.*, concrete action controlling or urging a particular disposition. Arranging a meeting or asking a question—prefatory, informational steps—do not act "on" governmental disposition of anything.

Second, the panel's construction "'overrides' the 'usual constitutional balance of federal and state powers.'" *Bond*, 134 S. Ct. at 2089. Regulating the ethical conduct of state officials is traditionally a function of state law. Here, Virginia law expressly permitted Virginia officials to accept unlimited gifts and loans; hence the jury was instructed that there was "no suggestion" Gov. McDonnell violated Virginia law. App.276a; *see* Va. Code § 2.2-3103(8)-(9) (accepting gifts, even "on a basis so frequent as to raise an appearance of the use of ... public office for private gain," or where "timing and nature of the gift would cause a reasonable person to question the officer's or employee's impartiality," is not criminal).[2] The Government may dislike Virginia's ethics laws,

[2] And indeed, prior Virginia officials accepted similar gifts and benefits without consequence. *See, e.g.*, *$18,000 Vacation Puts Kaine Atop Gift Recipients List*, WASH. TIMES, Feb. 4, 2006.

but it cannot displace them absent clear congressional intent.

Third, the panel's interpretation of these statutes raises grave doubts about their constitutionality. Most significantly, it makes them both extremely vague and extremely broad—vesting prosecutors with unbridled discretion to choose targets from among virtually every elected official. That risk of "arbitrary and discriminatory prosecutions" "raise[s] the due process concerns underlying the vagueness doctrine." *Skilling*, 561 U.S. at 408, 412. Further, the panel's holding criminalizes political fundraising—wherein money is expressly exchanged for access—that the First Amendment protects. *Supra*, II.A.2. Finally, the panel's theory raises Tenth Amendment concerns, akin to federal limits on campaign contributions to state officials. *Cf. United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring). Indeed, if the panel's construction were correct, these statutes would be unconstitutional.

In short, the panel's decision construing the federal corruption statutes "in a manner that leaves [their] outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials" warrants this Court's review. *McNally v. United States*, 483 U.S. 350, 360 (1987).

B. The Opinion Below Conflicts With Three Other Circuits.

Three Circuits have squarely rejected the novel theory embraced below.

1. In an important early honest-services fraud and Hobbs Act case, the Eighth Circuit rejected an

expansive definition of "official act" that would have encompassed the acts here. *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978). In *Rabbitt*, which has been cited by more than 100 courts, Missouri's House Speaker "offered, for a fee ... , to introduce [an architectural] firm" to high-ranking state officials who "might be able to secure [state] architectural contracts for it." *Id.* at 1020. That was not criminal: "[W]hile Rabbitt's influence obviously helped these architects obtain state jobs, no testimony established that any state contracting officer awarded any contract ... because of Rabbitt's influence." *Id.* at 1028. As the court later explained, it reversed the conviction because Mr. Rabbitt "promised only to introduce the firm to influential persons" and "did not promise to use his official position to influence those persons." *United States v. Loftus*, 992 F.2d 793, 796 (8th Cir. 1993).

Rabbitt confirms the critical distinction between pressuring others to make a governmental decision versus affording access without trying to control the ultimate outcome. The Eighth Circuit held it was not criminal for Mr. Rabbitt to introduce benefactors to officials "and thereby gain them a friendly ear," even though their goal was "obtain[ing] state jobs." 583 F.2d at 1028. Mr. Rabbitt may have taken official action in a colloquial sense—but not in the statutory sense, as he did not exercise government power or pressure others to. To take official action, he needed to take the further step of "us[ing] his official position to influence those persons." *Loftus*, 992 F.2d at 796.

2. The First Circuit has drawn the same line. *United States v. Urciuoli*, 513 F.3d 290 (1st Cir. 2008), considered a state senator who took payments

from a hospital in exchange for three types of conduct. Judge Boudin's opinion found that the participants could be convicted for paying the senator to "try to 'kill' certain bills," to take action "with respect to pending legislative matters," and to "deliver[] a barely veiled warning of potential legislative trouble" for insurers if they did not favor the hospital, thereby "deliberately" "exploit[ing]" the senator's "leverage" of official powers. *Id.* at 292, 296-97. In contrast, paying the senator to lobby mayors to act in a way that benefited the hospital was not criminal. *Id.* at 294. Unlike the other acts, that conduct did not abuse the senator's "*official power*." *Id.* at 297 (emphasis added). There was "no indication that [he] invoked any purported oversight authority or threatened to use official powers in support of his advocacy." *Id.* at 296.

Urciuoli rested on the critical difference between acts that use or invoke "official power[s]," *id.* at 295, 296, 297, versus merely "trad[ing]" on the "reputation, network," or prestige that "comes with political office," *id.* at 296. The latter assures "access and attention," but does not control any government decision. *Id.* It is thus not an "official act." Because the jury in *Urciuoli* was not instructed on this crucial distinction, the court ordered a new trial. *Id.* at 295.

3. Finally, the D.C. Circuit agrees that "official action" is limited to acts that influence actual government decisions. In *Valdes*, the *en banc* court concluded that a policeman who used an official database to perform searches for license plates and outstanding warrants had not taken official action. 475 F.3d at 1321-22. While those searches fell within his official duties, he did not exercise any

"inappropriate influence on decisions that the government actually makes." *Id.* at 1325.

As the court later explained, Valdes' "purely informational inquiry" is distinct from seeking "to influence" an actual government decision, such as by "urg[ing]" another official "to expedite" a visa application. *United States v. Ring*, 706 F.3d 460, 469-70 (D.C. Cir. 2013). Thus, in stark contrast to this case, D.C. federal courts instruct juries that "[t]he fact that gifts or hospitality might make a public official willing to take a lobbyist's phone call or might provide the lobbyist greater access to the official's appointment schedule is not enough by itself" to warrant conviction. Trial Tr. Day 12, *United States v. Ring*, No. CR 08-274 (D.D.C. Nov. 3, 2010), Dkt. 270, at 37 That conflict—between the Circuit housing our Nation's capital and the one surrounding it—is alone untenable enough to warrant review.

4. While the First, Eighth, and D.C. Circuits have limited "official action" to exercising, urging the exercise of, or threatening to exercise governmental power, the Fourth Circuit upheld Gov. McDonnell's convictions even though he did none of those things and even though the jury was not required to find *any* connection between his acts and any exercise of state power. The acts the panel cited to affirm the convictions—(i) asking a cabinet secretary to send a deputy to a "briefing" about Star; (ii) asking researchers whether studying Star's product would be "good"; (iii) asking his counsel to "see" him about the matter; and (iv) asking two state officials "if they would be willing to meet" with Star, App.71a-74a—would not suffice for liability in the other Circuits.

Rabbitt held that arranging meetings, even those at which state business would be discussed, was not "official" absent further efforts "to influence" policy outcomes. *Loftus*, 992 F.2d at 796. Yet Gov. McDonnell was convicted for just that—arranging or proposing meetings at which Williams could discuss matters of interest to him with other officials. While Gov. McDonnell facilitated introductions, he never "use[d] his official position to influence" anyone. *Id.* To the contrary, the staffer who attended the only meeting that ensued testified that Gov. McDonnell wanted "nothing more" than her attendance and honest judgment on any policy issues. App.194a, 200a-203a.

The decision below is also in direct conflict with *Urciuoli*. None of Gov. McDonnell's actions involved an exercise—or "threat[]" to exercise—"official power[]" on behalf of Star; there is no evidence that Gov. McDonnell ever "misus[ed] his official power," as opposed to granting mere "access and attention." *Urciuoli*, 513 F.3d at 296-97. And the jury was not instructed it had to find misuse of official power; to the contrary, it was told, akin to the jury in *Urciuoli*, to convict if Gov. McDonnell took any "acts that a public official customarily performs." App.275a.

Nor could Gov. McDonnell have been convicted in the D.C. Circuit. Attending briefings, asking questions, and talking to aides are all "purely informational." *Ring*, 706 F.3d at 470. They exert no "inappropriate influence on decisions that the government actually makes." *Valdes*, 475 F.3d at 1325. Gov. McDonnell never took the next step—the only prohibited step, under D.C. Circuit law—of urging a governmental decision in Williams' favor.

And again, over objection, the jury was not instructed—unlike the *Ring* jury, *see supra* at 25—that taking a "phone call" or granting "greater access" are not, standing alone, "official acts."

The panel made no attempt to distinguish *Rabbitt*, *Loftus*, *Valdes*, or *Ring*, thus implicitly acknowledging its disagreement with those courts. The panel did cite *Urciuoli* in a footnote, purporting to distinguish its jury instructions. App.53a. The instructions were indeed different, but the panel overlooked *Urciuoli*'s broader holding—*i.e.*, that an "official act" is one that exercises or threatens to exercise "official power," thus "misusing" sovereign authority. 513 F.3d at 297. That misuse of official power is absent here. And just as in *Urciuoli*, the requirement that an "official act" invoke "official power" was never imparted to the jury.

5. The panel appeared at times to accept Gov. McDonnell's legal rule yet find it satisfied, broadly asserting that he "use[d] the power of his office to influence governmental decisions." App.71a. But the panel's explication of that "influence" exposes its conflict with the other Circuits.

In explaining how Gov. McDonnell supposedly "use[d] the power of his office to influence governmental decisions," the panel's first illustration was that he "asked his Secretary of Health ... to send a deputy to a 'short briefing'" about potential research trials. App.71a. But there was no evidence (and the panel cited none) that Gov. McDonnell told the Secretary or deputy to institute trials, to pressure anyone to do so, or to do anything besides attend a briefing. The deputy's testimony confirmed as much:

> Q[:] What did you understand the desires of the Governor and the First Lady to be specific to this issue?
>
> A[:] At the time of the note, nothing more than attending the meeting.

App.193a-194a. Following the meeting, the deputy sent a "blow-off e-mail" to Williams:

> Q[:]... When you wrote this e-mail, what did you understand your job to be going forward ... ?
>
> A[:] Nothing at the time of the written e-mail.
>
> ...
>
> Q[:] So after this meeting ... you still had no idea what [Mrs. McDonnell's] desires, if any, were with respect to Mr. Williams and Star. Is that fair?
>
> A[:] Shy of attending the meeting, no.

App.198a, 201a, 206a-207a. As the deputy testified, Gov. McDonnell never "interfere[d] with [her office's] decision-making process." App.203a. Yet under the reasoning below, merely asking the deputy to attend that meeting—without placing a thumb on the ultimate decision—consummated a felony.

The panel's next examples were Gov. McDonnell asking researchers whether clinical studies "could 'be something good'" for Virginia and asking an aide to "see" him about studies. App.72a. But again, the panel cited no evidence that Gov. McDonnell pressured anyone to make governmental decisions one way or the other. No such evidence exists; and no studies happened. *Accord* App.74a (last example is

asking two officials "if they would be willing to meet with Star," but not directing them further).

In short, the panel held that arranging a meeting or inquiring about an issue itself "exploit[s]" official power "to influence" the ultimate policy decision. App.73a. But that conflates procedural access with substantive influence, eradicating the foundational line drawn by *Rabbitt*, *Valdes*, and *Urciuoli*. Under the Fourth Circuit's flawed rationale—that a meeting is a "step" toward a donor's objective, so arranging a meeting illegally promotes that objective—Mr. Rabbitt *did* influence the official decisions whether to award state contracts to the bribe-payors. After all, his efforts to "gain [his benefactors] a friendly ear" was the first step toward their "obtain[ing] state jobs." *Rabbitt*, 583 F.2d at 1028. *But see Loftus*, 992 F.2d at 796. Likewise, on the Fourth Circuit's logic, a "purely informational" inquiry about a matter is an action "on" the matter. *But see Ring*, 706 F.3d at 470. Granting "access" is, on that view, legally equivalent to exercising "official powers." *But see Urciuoli*, 513 F.3d at 296 (trading on "access" not criminal).

Procedural access may be a first step toward a governmental decision. But that does not make the access itself (the call, email, or meeting) an "official act." Access merely allows government to work; it does not corrupt it, and cannot be "described as a deprivation of honest services, actually or potentially harmful to the citizens." *Urciuoli*, 513 F.3d at 295. The corruption laws are not implicated when the officials responsible for making actual government decisions exercise unfettered judgment. And those officials undisputedly *did* exercise such unfettered judgment here. App.201a, 210a-211a, 237a—as their

failure to do anything for Williams throughout a supposed two-year conspiracy confirms, and as the courts below never denied. The convictions here are thus based on precisely the sort of "[i]ngratiation and access" this Court has consistently explained "are not corruption." *Citizens United*, 558 U.S. at 360.

6. Further, the panel did not, unlike *Urciuoli* and *Ring*, require the jury to be instructed that Gov. McDonnell had to agree to "influence" governmental decisions. Rather, it sufficed that the jury was quoted a complex statutory definition of "official act" followed by a broad expansion of what it *includes*—never hinting at what it *excludes*. App.55a-65a. *But see Urciuoli*, 513 F.3d at 295 (vacating where jury not told this critical point); *Ring*, *supra*, Dkt. 270, at 37 (instructing jury that taking "phone call" or providing "greater access to the official's appointment schedule is not enough"). Jurors were never told, for example, despite repeated defense requests, that an "official act" must be "intended to ... influence a specific official decision the government actually makes." App.254a; *see also* App.146a-147a; App.251a-257a.

That left the Government free to argue that influencing governmental decisions was *irrelevant*. It told the jury to review the "jury instructions" and "look for the word pressure"—it "doesn't appear anywhere." App.268a. All that mattered, it claimed, was that Gov. McDonnell took "actions that have been clearly established by settled practice as a part of a public official's position ... on the issue of Virginia business development," a "capital priority of Bob McDonnell's administration." App.263a. Thus, if Gov. McDonnell posed for "photos ... making comments at different ribbon cuttings ... for money,

it's a crime." App.264a. "Whatever it was, it's all official action," App.263a, which is, no doubt, why the jurors wrongly believed the question was: "Would the McDonnells have received these gifts if Bob McDonnell weren't governor?" Josh Gerstein, *Why John Edwards Won and Bob McDonnell Lost*, POLITICO, Sept. 5, 2014 (quoting juror).

The evidence and arguments below illustrate the radically expansive definition of "official action" in the panel-approved instructions. One of the acts the Government relied heavily on was Williams' invitation to a cocktail party, with the Government stressing how "valuable it was to get invited." App.262a. But that party did not involve discussion of any governmental matter, so it could not possibly be an "official act." It *was*, however, "official" under the instructions—which is why the Government accurately argued that, under the instructions, the invitation was an "official act[]" on the broad "issue of Virginia business development." App.263a. Yet the panel's opinion completely ignores this act, even though the jury could have convicted on it alone.

In sum, the jury instructions validated the Government's all-encompassing theory that each of Gov. McDonnell's five acts was an "official" one allowing for conviction. By endorsing those instructions, the Fourth Circuit departed from its sister courts; blessed a conception of "official action" that reaches every action officials take; and thus created the very "absurdities" *Sun-Diamond* rejected.

C. The Opinion Below Criminalizes Ordinary Politics, Turning Nearly Every Elected Official Into A Felon.

The panel's sweeping decision presents an issue of extraordinary importance. The panel expanded "official action" from swaying specific sovereign decisions to anything that could "have the purpose or effect of exerting some influence on" any eventual sovereign decision, no matter how remote (App.54a); and the instructions it blessed turn every "settled practice" into official action. Under that limitless conception of corruption, every elected official and campaign donor risks indictment—which is why a broad, diverse, and bipartisan coalition of *amici* urged rejection of the Government's rule in both of the courts below. At the intersection of politics, federalism, and criminal justice, the scope of the corruption laws is of tremendous public significance.

Again, under the Fourth Circuit's rule, a call to discuss a policy issue is an "official act" to "influence" that issue. Referring a donor to an agency with jurisdiction over his concern is an "official act" to "influence" its work. Participating in a roundtable is an "official act" to "influence" any issue that arises. Even inviting donors to the White House Christmas Party is "official action" because of the "halo effect" or "credibility" it confers. App.261a. If that is the law, prosecutors have every reason to investigate whether the call, referral, roundtable, or invitation involved someone who had given a gift or campaign donation. If so, prosecutors could (as here) ask a jury to find a wink-and-nod *quid pro quo*—based solely on temporal nexus—and convict. Every official who accepts campaign funds and every citizen who gives

them is a potential target. Indeed, even independent expenditures backing the official could be the premise of criminal charges. *See United States v. Menendez*, No. 15-155, 2015 U.S. Dist. LEXIS 129850 (D.N.J. Sept. 28, 2015) (upholding indictment alleging official acts traded for contributions to Super PAC).

This is not hypothetical. The Court in *McConnell* described—without suggesting that any of this was criminal—"White House coffees that rewarded major donors with access to President Clinton," "courtesies extended" to someone whose donations were "motivated by his interest in gaining the Federal Government's support for an oil-line project," and donor programs that "promised 'special access to high-ranking ... elected officials, including governors, senators, and representatives.'" 540 U.S. at 130. "[N]ational party committees actually furnish[ed] their own menus of opportunities for access ..., with increased prices reflecting an increased level of access" to legislators. *Id.* at 151. The Court distinguished this open "peddling [of] access" from selling "actual influence." *Id.* at 150. Yet on the panel's view, there was no need for campaign-finance reform—all those officials, from the President down, *could have been convicted of bribery*.

In one striking example of an express exchange, the PAC created by Gov. McDonnell's successor, Gov. Terry McAuliffe, offered "events that donors may participate in for donations ranging from $10,000 to $100,000," including "intimate sit-down meetings with the governor and 'policy experts.'" Laura Vozzella, *In Va., $100,000 Will Get You a Sit-Down with 'Policy Experts,' Governor's New PAC Says*, WASH. POST, Mar. 18, 2014. Or during President

Obama's reelection, donors were openly rewarded with opportunities to speak to top officials about policies within their jurisdiction. Peter Nicholas, *Administration Officials Double as Obama Campaign Speakers*, L.A. TIMES, Nov. 16, 2011 (fundraisers where EPA Administrator took questions about oil pipeline). Neither Gov. McAuliffe nor President Obama has been indicted—but, given the panel's (erroneous) rule, that is presumably only by grace of prosecutorial discretion.

The rule below gives prosecutors a basis to investigate and indict essentially any official they choose. That is a dangerous power, inconsistent with our Nation's commitment to resolving political disputes through the political process rather than by putting opponents in prison. As President Obama's former White House Counsel recently wrote, the panel failed "to clarify the distinction between criminal and lawful politics," instead endorsing "ad hoc" tests that create "opportunity" for prosecutors, "risk" for politicians, and a "challenge" for courts. Bob Bauer, *The Judging of Politicians—By Judges*, MORE SOFT MONEY HARD LAW, July 14, 2015, http://goo.gl/DXb8F9.

This Court has few opportunities to review clean legal disputes about the scope of the corruption laws. And those opportunities come long after misguided prosecutions have shattered lives and altered elections. The staggeringly broad legal rule adopted below amply warrants this Court's review.

II. THE PRETRIAL PUBLICITY ISSUE ALSO MERITS THIS COURT'S REVIEW.

Must a trial court ask potential jurors who admit exposure to pretrial publicity if they have formed opinions about guilt and allow further questioning to uncover bias? The panel said no, holding that courts may rely on those jurors' collective, untested assurance that they can be fair. That ruling conflicts with decisions of this Court and the other Circuits.

A. The Panel Endorsed Inadequate *Voir Dire* Of Publicity-Exposed Jurors.

The decision below endorsed, in one of the most politicized, high-profile prosecutions in Virginia history, the district court's refusal to ask jurors who admitted exposure to vitriolic pretrial publicity—including 10 of the 12 jurors who voted to convict, *see generally* D.Ct. Dkt. 656-1, at Question 83—the most basic question: Have you formed opinions about guilt based on such exposure?

The defense repeatedly requested this question, at first *jointly* with the Government in a proposed questionnaire: "Based on what you have read, heard, seen, and/or overheard in conversations, please tell us what opinions, if any, you have formed about the guilt or innocence of [petitioner]." App.150a. The district court inexplicably struck that question. The panel upheld that deletion on a ground nobody advanced—that the question "invites" jurors "to deliberate on the defendant's guilt." App.30a. But that question asked only whether jurors (who completed the questionnaires at home) had already formed opinions; it did not invite them to start forming them. Besides, Gov. McDonnell requested

three different forms of this question, such as: "At any time have you ever formed or expressed any opinion about this case, or any of the people involved?" App.152a. The court rejected those, too. App.159a ("I'm not asking these questions").

Instead, after acknowledging "a lot of media interest," the court asked the 142 prospective jurors to stand "if you have read, heard or seen something in the media." App.160a. Virtually everyone stood. The court then directed: "[I]f you are, in your mind, able to put aside whatever it is that you've heard, listen to the evidence in this case and be fair to both sides, then I want you to sit down." *Id.* Everyone sat. *Id.* The court announced it was "satisfied," *id.*, and refused more questions about exposure to publicity, despite defense counsel requesting additional inquiry. App.161a ("I can't trust the credibility of that without a further inquiry."). The panel blessed that process, holding that criminal defendants have no right to "individual questioning" to ferret out "the pernicious effects of pretrial publicity." App.31a.[3]

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[3] As the Government agreed at oral argument below, the defense requested "individual voir dire of each one of these [142] people to discuss pretrial publicity" and "the district court said no." Oral Arg. Audio at 32:13-32:38, http://goo.gl/O86TIB. The panel noted that the court conducted "one-on-one questioning" of eight prospective jurors "after the defense singled them out on the basis of their responses to a jury selection questionnaire." App.26a. That questioning was limited to "specific folks who we need to look at specific responses [on questionnaires]," App.161a—*i.e.*, issues *other than* mere exposure to pretrial publicity. Hence the court refused to question one juror who had not given answers beyond admitting exposure to publicity. *See* App.164a ("I'm sorry, ma'am. We thought there was something on your questionnaire. So you can have a seat.").

B. The Decision Below Conflicts With Decisions Of This Court And Multiple Other Circuits.

The panel departed from decisions of this Court and other Circuits in two fundamental respects.

First, this Court has long required district courts to ask potential jurors exposed to prejudicial pretrial publicity whether they have formed opinions about guilt as a result. For example, *Patton v. Yount* held that "[t]he relevant question is ... whether the jurors ... had such fixed opinions that they could not judge impartially the guilt of the defendant." 467 U.S. 1025, 1035 (1984). Likewise, *Mu'Min v. Virginia* explained that trial courts "must" decide "is this juror to be believed when he says he has not formed an opinion about the case?" 500 U.S. 415, 425 (1991). It is impossible to know whether a juror's opinion is "fixed," or whether a juror is "to be believed," if the court refuses to ask whether publicity-exposed jurors have formed opinions in the first place.

The other Circuits faithfully follow these rulings and require this basic question. *See, e.g., United States v. Rahman*, 189 F.3d 88, 121 (2d Cir. 1999) ("[T]he Constitution requires only that the Court determine whether they have formed an opinion about the case."); *Pruett v. Norris*, 153 F.3d 579, 587 (8th Cir. 1998) (similar); *United States v. Dellinger*, 472 F.2d 340, 374-75 (7th Cir. 1972) (similar). Petitioner is aware of no decision, other than the panel's, endorsing *voir dire* that omits it. The Fourth Circuit stands alone in denying defendants the right to know whether potential jurors who admit exposure to pretrial publicity have formed opinions about guilt.

Second, this Court has long recognized that, although potential jurors are probably "sincere" when they say they can "be fair and impartial," "the psychological impact requiring such a declaration before one's fellows is often its father." *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). Thus, in *Murphy v. Florida*, the Court held that "[a] juror's assurances that he is equal to this task [of laying aside his opinions and being fair] *cannot be dispositive of the accused's rights*." 421 U.S. 794, 800 (1975) (emphasis added). Applying this principle, the Court rejected a *voir dire* challenge in *Skilling* only after finding that the trial court "examined each prospective juror individually, thus preventing the spread of any prejudicial information to other venire members" and accorded the parties "an opportunity to ask follow-up questions of every prospective juror brought to the bench for colloquy." 561 U.S. at 389. And three Justices still dissented. *See id.* at 427 (Sotomayor, Stevens, Breyer, JJ., dissenting in part).

Consistent with these decisions, the other Circuits forbid trial courts from relying "solely on a juror's assertion of impartiality." *United States v. Pratt*, 728 F.3d 463, 470 (5th Cir. 2013). In the Fifth Circuit, for example, "a court may not rely solely on a juror's assertion of impartiality but instead must conduct a sufficiently probing inquiry to permit the court to reach its own conclusion." *Id.* "[M]erely asking potential jurors to raise their hands if they could not be impartial was not adequate voir dire in light of significant pretrial publicity," even with "a general admonishment to the venire that they would be required to decide the case impartially." *Id.* at 471. The decision below squarely rejects that rule.

App.31a ("[M]erely asking for a show of hands was not an abuse of discretion.").

Six other Circuits agree—contrary to the opinion below—that courts cannot accept jurors' assurances of impartiality at face value:

> **First Circuit**: "[W]here there is ... a significant possibility that jurors have been exposed to potentially prejudicial material, and on request of counsel, we think that the court should proceed to examine each prospective juror apart from other jurors and prospective jurors, with a view to eliciting the kind and degree of his exposure to the case or the parties, the effect of such exposure on his present state of mind, and the extent to which such state of mind is immutable or subject to change from evidence." *Patriarca v. United States*, 402 F.2d 314, 318 (1st Cir. 1968); *see also United States v. Rhodes*, 556 F.2d 599, 601 (1st Cir. 1977) (reversing conviction).
>
> **Second Circuit**: "[M]erely going through the form of obtaining jurors' assurances of impartiality is insufficient." *United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 372 (2d Cir. 1963) (en banc) (reversing conviction).
>
> **Third Circuit**: "We agree with [the Second Circuit in *Bloeth*] that in the absence of an examination designed to elicit answers which provide an objective basis for the court's evaluation, 'merely going through the form of obtaining juror's assurances of impartiality is insufficient to test that impartiality.'" *Waldorf v. Shuta*, 3 F.3d 705, 712 (3d Cir. 1993) (reversing).

Seventh Circuit: "Natural human pride would suggest a negative answer to whether there was a reason the juror could not be fair and impartial.... [T]he question is not adequate to bring out responses showing that jurors had gained information and formed opinions about relevant matters in issue if in truth any had." *Dellinger*, 472 F.2d at 375 (reversing conviction).

Ninth Circuit: "Because of the voluminous publicity antedating appellant's trial, some of which was prejudicial in nature, ... the court's voir dire examination should have been directed to the individual jurors." *Silverthorne v. United States*, 400 F.2d 627, 639 (9th Cir. 1968) (reversing conviction).

Eleventh Circuit: It is not sufficient to ask if potential jurors have "formed and expressed any opinion in regard to ... guilt or innocence" and whether jurors' minds are "perfectly impartial," because those questions yield only a "conclusory protestation." *Jordan v. Lippman*, 763 F.2d 1265, 1281 (11th Cir. 1985) (vacating conviction).

C. This Is An Increasingly Important Issue Worthy Of The Court's Review.

The right to an impartial jury is the cornerstone of our criminal justice system; *voir dire* is the primary mechanism for protecting that right. The minimum requirements for *voir dire*—the rules that ensure it supplies more than empty theater—present an important, recurring question of law. And it is one that becomes more important every day, as media coverage becomes increasingly pervasive, sensationalist, and vituperative.

The panel opinion blesses a perfunctory *voir dire* that this Court's decisions foreclose and seven other Circuits reject. That provides an ideal vehicle for this Court to clarify the minimum *voir dire* requirements in the face of extensive, negative pretrial publicity.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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OCTOBER 2015

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-4019

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

v.

ROBERT F MCDONNELL,

Defendant—Appellant.

FORMER VIRGINIA ATTORNEYS GENERAL; ANDREW P. MILLER; ANTHONY FRANCIS TROY; J. MARSHALL COLEMAN; MARY SUE TERRY; STEPHEN DOUGLAS ROSENTHAL; MARK L. EARLEY; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; NANCY GERTNER, Law Professor; CHARLES J. OGLETREE, JR., Law Professor; JOHN C. JEFFRIES, JR., Law Professor; BENJAMIN TODD JEALOUS; REPUBLICAN GOVERNORS PUBLIC POLICY COMMITTEE; FORMER STATE ATTORNEYS GENERAL (NON-VIRGINIA); BUSINESS LEADERS AND PUBLIC POLICY ADVOCATES; VIRGINIA LAW PROFESSORS; FORMER FEDERAL OFFICIALS; MEMBERS AND

FORMER MEMBERS OF THE VIRGINIA GENERAL ASSEMBLY,

Amici Supporting Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. James R. Spencer, Senior District Judge. (3:14-cr-00012-JRS-1)

Argued: May 12, 2015 Decided: July 10, 2015

Before MOTZ, KING, and THACKER, Circuit Judges.

Affirmed by published opinion. Judge Thacker wrote the opinion, in which Judge Motz and Judge King joined.

ARGUED: Noel J. Francisco, JONES DAY, Washington, D.C., for Appellant. Richard Daniel Cooke, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee. **ON BRIEF**: John L. Brownlee, Daniel I. Small, Christopher M. Iaquinto, Elizabeth N. Jochum, HOLLAND & KNIGHT LLP, Washington, D.C.; Henry W Asbill, Charlotte H. Taylor, James M. Burnham, Ian Samuel, JONES DAY, Washington, D.C., for Appellant. Dana J. Boente, United States Attorney, Ryan S. Faulconer, Assistant United States Attorney, Raymond Hulser, Acting Chief, Public Integrity Section, Alexandria, Virginia, Michael S. Dry, Assistant United States Attorney, Jessica D. Aber, Assistant United States Attorney, David V Harbach, II, Criminal Division, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia,

for Appellee. William H. Hurd, Stephen C. Piepgrass, TROUTMAN SANDERS LLP, Richmond, Virginia, for Amici Former Virginia Attorneys General Andrew P Miller, Anthony Francis Troy, J. Marshall Coleman, Mary Sue Terry, Stephen Douglas Rosenthal, and Mark L. Earley. David B. Smith, SMITH & ZIMMERMAN, PLLC, Alexandria, Virginia; John D. Cline, LAW OFFICE OF JOHN D. CLINE, San Francisco, California, for Amicus National Association of Criminal Defense Lawyers. William W Taylor, III, ZUCKERMAN SPAEDER LLP, Washington, D.C., for Amici Nancy Gertner, Law Professor, Charles J. Ogletree, Jr., Law Professor, and John C. Jeffries, Jr., Law Professor. Wyatt B. Durrette, Jr., Barrett E. Pope, Robert Rae Gordon, DURRETTE CRUMP PLC, Richmond, Virginia, for Amicus Benjamin Todd Jealous. Charles J. Cooper, David H. Thompson, Peter A. Patterson, John D. Ohlendorf, COOPER & KIRK, PLLC, Washington, D.C., for Amicus Republican Governors Public Policy Committee, a/k/a RGPPC. Brian D. Boone, Emily C. McGowan, Charlotte, North Carolina, Edward T. Kang, ALSTON & BIRD LLP, Washington, D.C., for Amici Former State Attorneys General (Non-Virginia). Gregory N. Stillman, Norfolk, Virginia, Edward J. Fuhr, Johnathan E. Schronce, Richmond, Virginia, William J. Haun, HUNTON & WILLIAMS LLP, Washington, D.C., for Amici Business Leaders and Public Policy Advocates. Timothy M. Richardson, POOLE MAHONEY PC, Virginia Beach, Virginia, for Amici Virginia Law Professors. William J. Kilberg, Thomas G. Hungar, Helgi C. Walker, David Debold, Katherine C. Yarger, Jacob T Spencer, GIBSON, DUNN & CRUTCHER

LLP, Washington, D.C., for Amici Former Federal Officials. John S. Davis, Joseph R. Pope, Jonathan T. Lucier, WILLIAMS MULLEN, Richmond, Virginia, for Amici Members and Former Members of the Virginia General Assembly.

THACKER, Circuit Judge:

Over the course of five weeks of trial, federal prosecutors sought to prove that former Governor of Virginia Robert F. McDonnell ("Appellant") and his wife, Maureen McDonnell, accepted money and lavish gifts in exchange for efforts to assist a Virginia company in securing state university testing of a dietary supplement the company had developed. The jury found Appellant guilty of eleven counts of corruption and not guilty of two counts of making a false statement.[1]

Appellant appeals his convictions, alleging a multitude of errors. Chiefly, Appellant challenges the jury instructions—claiming the district court misstated the law—and the sufficiency of the evidence presented against him. He also argues that his trial should have been severed from his wife's trial; that the district court's voir dire questioning violated his Sixth Amendment rights; and that the district court made several erroneous evidentiary rulings. Upon consideration of each of Appellant's contentions, we conclude that the jury's verdict must

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[1] The jury also found Mrs. McDonnell guilty of eight counts of corruption and one count of obstruction of an official proceeding. The jury found her not guilty of three counts of corruption and one count of making a false statement. Her appeal is not at issue here, as it is pursued separately.

stand and that the district court's judgment should be affirmed.

I.

A.

On November 3, 2009, Appellant was elected the seventy-first Governor of Virginia. From the outset, he made economic development and the promotion of Virginia businesses priorities of his administration.

The economic downturn preceding the election had taken a personal toll on Appellant. Mobo Real Estate Partners LLC ("Mobo"), a business operated by Appellant and his sister, was losing money on a pair of beachfront rental properties in Virginia Beach. When Appellant became Governor, he and his sister were losing more than $40,000 each year. By 2011, they owed more than $11,000 per month in loan payments. Each year their loan balance increased, and by 2012, the outstanding balance was nearing $2.5 million.

Appellant was also piling up credit card debt. In January 2010, the month of his inauguration, Appellant and his wife had a combined credit card balance exceeding $74,000. Eight months later, in September 2010, the combined balance exceeded $90,000.

B.

While Appellant was campaigning on promises of economic development in Virginia, Virginia-based Star Scientific Inc. ("Star") and its founder and chief executive officer Jonnie Williams were close to launching a new product: Anatabloc. For years, Star had been evaluating the curative potential of anatabine, an alkaloid found in the tobacco plant,

focusing on whether it could be used to treat chronic inflammation. Anatabloc was one of the anatabine-based dietary supplements Star developed as a result of these years of evaluation.

Star wanted the Food and Drug Administration to classify Anatabloc as a pharmaceutical. Otherwise, it would have to market Anatabloc as a nutraceutical, which generally has less profit potential than a pharmaceutical. Classification as a pharmaceutical would require expensive testing, clinical trials, and studies. But Star did not have the financial wherewithal to conduct the necessary testing, trials, and studies on its own. It needed outside research and funding.

C.

Appellant and Williams first met in December 2009—shortly after Appellant's election to the governorship but before his inauguration. Appellant had used Williams's plane during his campaign, and he wanted to thank Williams over dinner in New York.[2] During dinner, Williams ordered a $5,000 bottle of cognac and the conversation turned to the gown Appellant's wife would wear to Appellant's inauguration. Williams mentioned that he knew Oscar de la Renta and offered to purchase Mrs. McDonnell an expensive custom dress.[3]

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[2] Williams was one of several individuals who offered the use of a private plane to Appellant during his campaign on an as-needed basis. Although Appellant had used Williams's plane during his campaign, the two men did not meet until December 2009.

[3] In the end, Williams did not purchase an inauguration dress for Mrs. McDonnell. According to Williams, Appellant's chief

In October 2010, Appellant and Williams crossed paths again. This time, the two were on the same plane—Williams's plane—making their way from California to Virginia. During the six-hour flight, Williams extolled the virtues of Anatabloc and explained that he needed Appellant's help to move forward with the product:

> [W]hat I did was I explained to him how I discovered it. I gave him a basic education on the—on smoking, the diseases that don't happen with smokers and just tried to make sure he understood, you know, what I had discovered in this tobacco plant and that I was going to—what I needed from him was that I needed testing and I wanted to have this done in Virginia.

J.A. 2211.

By the end of the flight, the two agreed that "independent testing in Virginia was a good idea." J.A. 2211. Appellant agreed to introduce Williams to Dr. William A. Hazel Jr., the Commonwealth's secretary of health and human resources.

In April 2011, Mrs. McDonnell invited Williams to join the first couple at a political rally in New York. "I'll have you seated with the Governor and we can go shopping now," Mrs. McDonnell said, according to Williams. J.A. 2222 (internal quotation marks omitted). So Williams took Mrs. McDonnell on a

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counsel, Jacob Jasen Eige, called Williams, saying, "I understand that you're getting ready to purchase [Mrs.] McDonnell a dress for the inauguration. I'm calling to let you know that you can't do that." J.A. 2208 (internal quotation marks omitted). Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

shopping spree; they lunched and shopped at Bergdorf Goodman and visited Oscar de la Renta and Louis Vuitton stores on Fifth Avenue. Williams bought Mrs. McDonnell dresses and a white leather coat from Oscar de la Renta; shoes, a purse, and a raincoat from Louis Vuitton; and a dress from Bergdorf Goodman. Williams spent approximately $20,000 on Mrs. McDonnell during this shopping spree. That evening, Williams sat with Appellant and Mrs. McDonnell during a political rally.

A few weeks later, on April 29, Williams joined Appellant and Mrs. McDonnell for a private dinner at the Governor's Mansion. The discussion at dinner centered on Anatabloc and the need for independent testing and studies. Appellant, who had campaigned on promoting business in Virginia, was "intrigued that [Star] was a Virginia company with an idea," and he wanted to have Anatabloc studies conducted within the Commonwealth's borders. J.A. 6561.

Two days after this private dinner—on May 1, 2011—Mrs. McDonnell received an email via Williams.[4] The email included a link to an article entitled "Star Scientific Has Home Run Potential," which discussed Star's research and stock. Mrs. McDonnell forwarded this email to Appellant at 12:17 p.m. Less than an hour later, Appellant texted his sister, asking for information about loans and bank options for their Mobo properties. Later that evening, Appellant emailed his daughter Cailin,

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[4] Williams did not send the email to Mrs. McDonnell. However, the sender wrote, "Please give to the governor and his wife as per Jonnie Williams." G.S.A. 3. Citations to the "G.S.A." refer to the Supplemental Appendix filed by the Government.

asking her to send him information about the payments he still owed for her wedding.

The next day, May 2, Mrs. McDonnell and Williams met at the Governor's Mansion to discuss Anatabloc. However, Mrs. McDonnell began explaining her family's financial woes—thoughts about filing for bankruptcy, high-interest loans, the decline in the real estate market, and credit card debt. Then, according to Williams, Mrs. McDonnell said, "I have a background in nutritional supplements and I can be helpful to you with this project, with your company. The Governor says it's okay for me to help you and—but I need you to help me. I need you to help me with this financial situation." J.A. 2231 (internal quotation marks omitted). Mrs. McDonnell asked to borrow $50,000. Williams agreed to loan the money to the McDonnells. Mrs. McDonnell also mentioned that she and her husband owed $15,000 for their daughter's wedding reception. Again, Williams agreed to provide the money. Before cutting the checks, Williams called Appellant to "make sure [he] knew about it." J.A. 2233. "I called him and said that, you know, 'I met with Maureen. I understand the financial problems and I'm willing to help. I just wanted to make sure that you knew about this,'" Williams recounted at trial. *Id.* Appellant's response was "Thank you." *Id.*

Three days later, on May 5 at 11 a.m., Appellant met with Secretary Hazel and Chief of Staff Martin Kent to discuss the strategic plan for the state's health and human resources office. Shortly after the meeting, Appellant directed his assistant to forward to Hazel the article about Star that Mrs. McDonnell had earlier brought to Appellant's attention.

Williams returned to the Governor's Mansion on May 23, 2011, to deliver two checks for the amounts discussed on May 2: a $50,000 check made out to Mrs. McDonnell and a $15,000 check that was not made out to anyone but was going to the wedding caterers. After Williams delivered these checks to Mrs. McDonnell, Appellant expressed his gratitude in a May 28 email to Williams:

> Johnnie. Thanks so much for alll your help with my family. Your very generous gift to Cailin was most appreciated as well as the golf round tomorrow for the boys. Maureen is excited about the trip to fla to learn more about the products Have a restful weekend with your family. Thanks.[5]

G.S.A. 20. The next day, as mentioned in the email, Appellant, his two sons, and his soon-to-be son-in-law spent the day at Kinloch Golf Club in Manakin-Sabot, Virginia. During this outing, they spent more than seven hours playing golf, eating, and shopping. Williams, who was not present, covered the $2,380.24 bill.

Also as mentioned in the email, Mrs. McDonnell traveled to Florida at the start of June to attend a Star-sponsored event at the Roskamp Institute.[6] While there, she addressed the audience, expressing her support for Star and its research. She also invited the audience to the launch for Anatabloc,

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[5] Text messages and emails are quoted verbatim without identifying any mistakes in the original. Alterations have been made only when necessary for clarification.

[6] The Roskamp Institute is a private research institute that studies Alzheimer's disease.

which would be held at the Governor's Mansion. The same day—June 1, 2011—she purchased 6,000 shares of Star stock at $5.1799 per share, for a total of $31,079.40.

Weeks later, Williams sent Appellant a letter about conducting Anatabloc studies in Virginia. Williams wrote, "I am suggesting that you use the attached protocol to initiate the 'Virginia study' of Anatabloc at the Medical College of Virginia and the University of Virginia School of Medicine, with an emphasis on endocrinology, cardiology, osteoarthritis and gastroenterology." G.S.A. 29. Appellant forwarded the letter and its attachments to Secretary Hazel for review.

Appellant's political action committee—Opportunity Virginia (the "PAC")—hosted and funded a retreat at the Omni Homestead Resort in Hot Springs, Virginia. The retreat began on June 23, 2011, and was attended by the top donors to Opportunity Virginia. Williams, "a $100,000 in-kind contributor to the campaign and the PAC," was invited, and he flew Appellant's children to the resort for the retreat. J.A. 6117 Appellant and Williams played golf together during the retreat. A few days later, Williams sent golf bags with brand new clubs and golf shoes to Appellant and one of his sons.

From July 28 to July 31, Appellant and his family vacationed at Williams's multi-million-dollar home at Smith Mountain Lake in Virginia. Williams allowed the McDonnells to stay there free of charge. He also paid $2,268 for the McDonnells to rent a boat. And Williams provided transportation for the family: Appellant's children used Williams's Range Rover for the trip to the home, and he paid more than $600 to

have his Ferrari delivered to the home for Appellant to use.

Appellant drove the Ferrari back to Richmond at the end of the vacation on July 31. During the three-hour drive, Mrs. McDonnell snapped several pictures of Appellant driving with the Ferrari's top down. Mrs. McDonnell emailed one of the photographs to Williams at 7:47 p.m. At 11:29 p.m., after returning from the Smith Mountain Lake vacation, Appellant directed Secretary Hazel to have his deputy attend a meeting about Anatabloc with Mrs. McDonnell at the Governor's Mansion the next day.

Hazel sent a staffer, Molly Huffstetler, to the August 1 meeting, which Williams also attended. During the meeting, Williams discussed clinical trials at the University of Virginia ("UVA") and Virginia Commonwealth University ("VCU"), home of the Medical College of Virginia ("MCV"). Then Williams and Mrs. McDonnell met with Dr. John Clore from VCU, who Williams said was "important, and he could cause studies to happen at VCU's medical school." J.A. 2273. Williams—with Mrs. McDonnell at his side—told Dr. Clore that clinical testing of Anatabloc in Virginia was important to Appellant. After the meeting ended, Mrs. McDonnell noticed the Rolex watch adorning Williams's wrist. She mentioned that she wanted to get a Rolex for Appellant. When Williams asked if she wanted him to purchase one for Appellant, she responded affirmatively.

The next day—August 2, 2011—Mrs. McDonnell purchased another 522 shares of Star stock at $3.82 per share, for a total of $1,994.04.

Appellant and one of his sons returned to Kinloch Golf Club on August 13, 2011. The bill for this golf outing, which Williams again paid, was $1,309.17. The next day, Williams purchased a Rolex from Malibu Jewelers in Malibu, California. The Rolex cost between $6,000 and $7,000 and featured a custom engraving: "Robert F. McDonnell, 71st Governor of Virginia." J.A. 2275 (internal quotation marks omitted). Mrs. McDonnell later took several pictures of Appellant showing off his new Rolex—pictures that were later sent to Williams via text message.

Over the next few weeks, Governor's Mansion staff planned and coordinated a luncheon to launch Anatabloc—an event paid for by Appellant's PAC. Invitations bore the Governor's seal and read, "Governor and Mrs. Robert F. McDonnell Request the Pleasure of your Company at a Luncheon." G.S.A. 104. Invitees included Dr. Clore and Dr. John Lazo from UVA. At the August 30 luncheon, each place setting featured samples of Anatabloc, and Williams handed out checks for grant applications—each for $25,000—to doctors from various medical institutions.[7]

Appellant also attended the luncheon. According to Lazo, Appellant asked attendees various questions about their thoughts about Anatabloc:

> So I think one question he asked us was, did we think that there was some scientific validity to

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[7] In total, Williams provided $200,000 for grant applications. All of the checks were distributed to researchers either at or about the time of the Anatabloc launch luncheon at the Governor's Mansion.

> the conversation and some of the pre-clinical studies that were discussed, or at least alluded to. He also, I think, asked us whether or not there was any reason to explore this further; would it help to have additional information. And also, he asked us about could this be something good for the Commonwealth, particularly as it relates to [the] economy or job creation.

J.A. 3344. According to Williams, Appellant was "[a]sking questions like 'What are the end points here? What are you looking for to show efficacy with the studies? How are you going to proceed with that?'" *Id.* at 2283. Appellant also thanked the attendees for their presence and "talked about his interest in a Virginia company doing this, and his interest in the product." *Id.* at 3927 Overall, "[Appellant] was generally supportive. [T]hat was the purpose." *Id.* at 2284.

Despite the fanfare of the luncheon, Star's President, Paul L. Perito, began to worry that Star had lost the support of UVA and VCU. In the fall of 2011, Perito was working with those universities to file grant applications. During a particular call with UVA officials, Perito felt the officials were unprepared. According to Perito, when Williams learned about this information, "[h]e was furious and said, 'I can't understand it. [Appellant] and his wife are so supportive of this and suddenly the administration has no interest.'" J.A. 3934.

D.

Prior to the beginning of 2012, Mrs. McDonnell sold all of her 6,522 shares of Star stock for

$15,279.45, resulting in a loss of more than $17,000. This allowed Appellant to omit disclosure of the stock purchases on a required financial disclosure form known as a Statement of Economic Interest. Then on January 20, 2012—four days after the Statement of Economic Interest had been filed—Mrs. McDonnell purchased 6,672 shares of Star stock at $2.29 per share, for a total of $15,276.88.

In the meantime, on January 7, 2012, Appellant made another golf visit to Kinloch Golf Club, running up a $1,368.91 bill that Williams again paid. Appellant omitted this golf outing and the 2011 golf trips from his Statements of Economic Interest. See J.A. 723 (noting Appellant's "deliberate omission of his golf-related gifts paid by Jonnie Williams"). Appellant also omitted from his Statement of Economic Interest the $15,000 check for the caterers at his daughter's wedding.

Also in January 2012, Williams discussed the Mobo properties with Mrs. McDonnell, who wanted additional loans. As a result, Williams agreed to loan more money. At the same time, he mentioned to Mrs. McDonnell that the studies with UVA were proceeding slowly. Mrs. McDonnell was "furious when [Williams] told her that [they were] bogged down in the administration." J.A. 2308. Later, Mrs. McDonnell called Williams to advise him that she had relayed this information to Appellant, who "want[ed] the contact information of the people that [Star] [was] dealing with at [UVA]." *Id.* at 2309 (internal quotation marks omitted).

Appellant followed up on these discussions by calling Williams on February 3, 2012, to talk about a $50,000 loan. Initially, Appellant wanted a cash loan,

but Williams mentioned that he could loan stock to Appellant. Williams proposed "that he could loan that stock either to [Appellant's] wife or he could loan it to [Mobo]." J.A. 6224. This conversation continued to February 29, when Williams visited the Governor's Mansion. During this meeting, Appellant and Williams discussed the potential terms of a stock transfer. However, Appellant and Williams did not move forward with this idea because Williams discovered he would have to report a stock transfer to the Securities and Exchange Commission. At trial, Williams testified that he did not want to transfer Star stock because he "didn't want anyone to know that I was helping the Governor financially with his problems while he was helping our company." *Id.* at 2333-34. When asked what he expected in return from Appellant, Williams testified, "I expected what had already happened, that he would continue to help me move this product forward in Virginia" by "assisting with the universities, with the testing, or help with government employees, or publicly supporting the product." *Id.* at 2355. In the end, Williams agreed to make a $50,000 loan, writing a check in this amount to the order of Mobo on March 6.

Also on February 3, one of Williams's employees responded to Mrs. McDonnell's request for a list of doctors Williams wished to invite to an upcoming healthcare industry leaders reception at the Governor's Mansion. The employee emailed the list of doctors to Mrs. McDonnell. Four days later—on February 7—Mrs. McDonnell sent a revised list of invitees for this event, a list that now included the doctors identified by Williams. The next day, Sarah Scarbrough, director of the Governor's Mansion, sent

an email to Secretary Hazel's assistant, Elaina Schramm. Scarbrough informed Schramm that "[t]he First Lady and Governor were going over the list last night for the healthcare industry event. The Governor wants to make sure [head officers at UVA and VCU, along with those of other institutions,] are included in the list." G.S.A. 146.

Mrs. McDonnell received an email, as previously requested by Appellant, containing the names of the UVA officials with whom Star had been working. She forwarded this list to Appellant and his chief counsel, Jacob Jasen Eige, on February 9. The next day, while riding with Appellant, Mrs. McDonnell followed up with Eige:

> Pls call Jonnie today [and] get him to fill u in on where this is at. Gov wants to know why nothing has developed w studies after Jonnie gave $200,000. I'm just trying to talk w Jonnie. Gov wants to get this going w VCU MCV Pls let us know what u find out after we return

G.S.A. 154.[8]

Less than a week later—on February 16, 2012 — Appellant emailed Williams to check on the status of certificates and documents relating to loans Williams was providing for Mobo. Six minutes after Appellant sent this email, he emailed Eige: "Pls see me about anatabloc issues at VCU and UVA. Thx." G.S.A. 157.

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[8] The $200,000 mentioned in Mrs. McDonnell's email to chief counsel Eige referred to checks that Star distributed to researchers either at or about the time of the Anatabloc launch luncheon at the Governor's Mansion.

The healthcare industry leaders reception was held on February 29—the same day as Appellant's private meeting about securing a loan from Williams. Following the reception, Appellant, Mrs. McDonnell, Williams, and two doctors went out for a $1,400 dinner on Williams's dime. During dinner the diners discussed Anatabloc. Mrs. McDonnell talked about her use of Anatabloc, and Appellant asked one of the doctors—a Star consultant—"How big of a discovery is this?" J.A. 2728 (internal quotation marks omitted). At one point during the dinner Mrs. McDonnell invited the two doctors to stay at the Governor's Mansion for the evening—an offer the doctors accepted.

On March 21, 2012, Appellant met with Virginia Secretary of Administration Lisa Hicks-Thomas, who oversaw state employee health plans and helped determine which drugs would be covered by the state health plan. At one point during the meeting, Appellant reached into his pocket, retrieving a bottle of Anatabloc. He told Hicks-Thomas that Anatabloc was "working well for him, and that he thought it would be good for state employees." J.A. 4227 He then asked Hicks-Thomas to meet with representatives from Star.

Almost two months later—on May 18, 2012 — Appellant sent Williams a text message concerning yet another loan: "Johnnie. Per voicemail would like to see if you could extend another 20k loan for this year. Call if possible and I'll ask mike to send instructions. Thx bob." G.S.A. 166. Twelve minutes later, Williams responded, "Done, tell me who to make it out to and address. Will FedEx. Jonnie." *Id.* at 168.

Later the same month—from May 18 to May 26 Appellant and his family vacationed at Kiawah Island in South Carolina. According to Appellant, the $23,000 vacation was a gift from William H. Goodwin Jr., whom Appellant characterized as a personal friend. Appellant did not report this gift on his 2012 Statement of Economic Interest. He said he did not need to report it because it fell under the "personal friend" exception to the reporting requirements.

Between April and July 2012, Appellant emailed and texted Williams about Star stock on four occasions, each coinciding with a rise in the stock price. In response to a text sent on July 3, Williams said, "Johns Hopkins human clinical trials report on aug 8. If you need cash let me know. Let's go golfing and sailing Chatham Bars inn Chatham mass labor day weekend if you can. Business about to break out strong. Jonnie." G.S.A. 170.

Appellant and his wife took Williams up on his Labor Day weekend vacation offer. Williams spent more than $7,300 on this vacation for the McDonnells. Williams paid the McDonnells' share of a $5,823.79 bill for a private clambake. Also joining in on the weekend excursion was one of the doctors who attended the February healthcare leaders reception, whom Williams invited in an attempt "to try to help get the Governor more involved." J.A. 2371.

Appellant said he learned in December 2012 that Mrs. McDonnell had repurchased Star stock in January 2012—despite having sold her entire holding of Star stock the previous year. Appellant testified that he "was pretty upset with her." J.A. 6270. This

revelation led to a tense conversation about reporting requirements:

> [I]t was her money that she had used for this. But I told her, you know, "Listen. If you have this stock, you know, this is"—"again, triggers a reporting requirement for me. I can do it, but I need"—"I just don't"—"I really don't appreciate you doing things that really"—"that affect me without"—"without me knowing about it."

Id. at 6271. That Christmas, Mrs. McDonnell transferred her Star stock to her children as a gift. This again allowed Appellant to file a Statement of Economic Interest that did not report ownership of the stock. That same month—December 2012—Williams gave Appellant's daughter Jeanine a $10,000 wedding gift.

E.

Eventually, all of these events came to light. And on January 21, 2014, a grand jury indicted Appellant and Mrs. McDonnell in a fourteen-count indictment. Appellant and Mrs. McDonnell were charged with one count of conspiracy to commit honest-services wire fraud, in violation of 18 U.S.C. § 1349; three counts of honest-services wire fraud, in violation of 18 U.S.C. § 1343; one count of conspiracy to obtain property under color of official right, in violation of 18 U.S.C. § 1951; six counts of obtaining property under color of official right, in violation of 18 U.S.C. § 1951; two counts of making a false statement, in violation of 18 U.S.C. § 1014; and one count of obstruction of official proceedings, in violation of 18 U.S.C. § 1512(c)(2).

Ultimately, the jury verdict of September 4, 2014, found Appellant not guilty of the false statements counts but guilty of all eleven counts of corruption.[9]

At sentencing the Government requested a sentence of 78 months—or six and a half years—of imprisonment, which was at the low end of the applicable Sentencing Guidelines range. However, the district court departed downward and sentenced Appellant to two years of imprisonment, followed by two years of supervised release. Appellant now challenges his convictions, asserting a litany of errors.

II.

A.

Motion for Severance

To begin, Appellant argues that the district court erred when it denied both his motion for severance and his request for ex parte consideration of this motion. We review these rulings for an abuse of discretion. *See United States v. Lighty*, 616 F.3d 321, 348 (4th Cir. 2010) (severance); *RZS Holdings AVV v. PDVSA Petroleo S.A.*, 506 F.3d 350, 356 (4th Cir. 2007) (ex parte proceeding).

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[9] The corruption counts include one count of conspiracy to commit honest-services wire fraud pursuant to 18 U.S.C. § 1349; three counts of honest-services wire fraud pursuant to 18 U.S.C. § 1343; one count of conspiracy to obtain property under color of official right pursuant to 18 U.S.C. § 1951; and six counts of obtaining property under color of official right pursuant to 18 U.S.C. § 1951. Only Mrs. McDonnell was charged with obstruction of official proceedings.

1.

Appellant contends that he was entitled to a trial separate from the trial of Mrs. McDonnell. He argues that a joint trial precluded him from calling Mrs. McDonnell as a witness and thus introducing exculpatory testimony. The district court denied Appellant's motion for severance. Appellant claims this decision was an abuse of the court's discretion.

In general, "defendants indicted together should be tried together." *Lighty*, 616 F.3d at 348. This is especially true when, as in this case, the defendants are charged with conspiracy. *See United States v. Parodi*, 703 F.2d 768, 779 (4th Cir. 1983). So a defendant seeking severance based on the need for a co-defendant's testimony must make an initial showing of "(1) a bona fide need for the testimony of his co-defendant, (2) the likelihood that the co-defendant would testify at a second trial and waive his Fifth Amendment privilege, (3) the substance of his co-defendant's testimony, and (4) the exculpatory nature and effect of such testimony." *Id.* After the initial showing is made, a district court should

> (1) examine the significance of the testimony in relation to the defendant's theory of defense; (2) assess the extent of prejudice caused by the absence of the testimony; (3) pay close attention to judicial administration and economy; (4) give weight to the timeliness of the motion[;] and (5) consider the likelihood that the co-defendant's testimony could be impeached.

Id.

Appellant failed to satisfy even the initial showing requirements of *United States v. Parodi*. The district

court denied Appellant's motion for severance because Appellant offered only vague and conclusory statements regarding the substance of Mrs. McDonnell's testimony. As we expressed in *Parodi*, vague and conclusory statements regarding potential testimony are not enough to establish the substance of a co-defendant's testimony. *See* 703 F.2d at 780.

Appellant's motion to sever paints a picture of Mrs. McDonnell's potential testimony in broad strokes without filling in any details:

> *First*, her testimony would disprove the Government's primary claim that the McDonnells acted in concert through a criminal conspiracy to corruptly accept gifts and loans in exchange for Mr. McDonnell using his office to benefit Williams and his company. *Second*, her testimony would refute the Government's allegation that Mr. McDonnell agreed or promised to use his office to improperly "promote" Star's products or to "obtain research studies for Star Scientific's products." *Third*, Mrs. McDonnell would refute the Government's allegation that she solicited certain gifts and loans identified in the Indictment. *Finally*, Mrs. McDonnell would refute the Government's allegation that the McDonnells "took steps to conceal" their supposed scheme.

J.A. 296 (alternation in original) (citations omitted). Presented with only these unadorned statements regarding the substance of Mrs. McDonnell's potential testimony, the district court appropriately exercised its discretion when it denied the motion to sever.

2.

Appellant claimed he could provide a more detailed account of the substance of Mrs. McDonnell's potential testimony—an account he offered to share with the district court on the condition that the district court review the evidence ex parte. The district court denied this invitation, finding an ex parte proceeding would be inappropriate.

Ex parte proceedings and communications are disfavored because they are "fundamentally at variance with our conceptions of due process." *Doe v. Hampton*, 566 F.2d 265, 276 (D.C. Cir. 1977), quoted in *Thompson v. Greene*, 427 F.3d 263, 269 n.7 (4th Cir. 2005). However, such proceedings and communications may be permissible in limited circumstances. "[O]ur analysis should focus, first, on the parties' opportunity to participate in the court's decision and, second, on whether the ex parte proceedings were unfairly prejudicial." *RZS Holdings AVV*, 506 F.3d at 357

Ex parte proceedings were not justified in this case. Appellant sought to withhold from the Government all of the information necessary to establish the necessity of severance. This proposal would have barred the Government from challenging whether Appellant actually satisfied the initial showing required by *Parodi*. If the district court proceeded as Appellant requested, it would have been the only entity in a position to challenge Appellant's contentions. The district court was reluctant to assume the role of an advocate when evaluating "a motion to sever[, which] requires a fact-intensive, multi-factored analysis for which there is a heightened need for well-informed advocacy."

J.A. 351.[10] It properly exercised its discretion by denying Appellant's request. Appellant also maintains that the district court erred by failing to defer its ruling on the motion to sever until 14 days prior to trial. The district court was not obligated to consider this request because Appellant waited until his reply to argue this issue. *Cf. U.S. S.E.C. v. Pirate*

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[10] In *United States v. Napue*, the Seventh Circuit elaborated on the problems presented by ex parte communications between a court and the Government:

> Ex parte communications between the government and the court deprive the defendant of notice of the precise content of the communications and an opportunity to respond. These communications thereby can create both the appearance of impropriety and the possibility of actual misconduct. Even where the government acts in good faith and diligently attempts to present information fairly during an ex parte proceeding, the government's information is likely to be less reliable and the court's ultimate findings less accurate than if the defendant had been permitted to participate. However impartial a prosecutor may mean to be, he is an advocate, accustomed to stating only one side of the case. An ex parte proceeding places a substantial burden upon the trial judge to perform what is naturally and properly the function of an advocate.

834 F.2d 1311, 1318-19 (7th Cir. 1987) (emphasis omitted) (citations omitted) (internal quotation marks omitted). The reversal of roles in this case does not change the equation. *See Alderman v. United States*, 394 U.S. 165, 184 (1969) ("As the need for adversary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of ex parte procedures as a means for their accurate resolution, the displacement of well-informed advocacy necessarily becomes less justifiable." (emphasis omitted)).

Investor LLC, 580 F.3d 233, 255 n.23 (4th Cir. 2009) ("Ordinarily we do not consider arguments raised for the first time in a reply brief "); *Mike's Train House, Inc. v. Broadway Ltd. Imports, LLC*, 708 F Supp. 2d 527, 535 (D. Md. 2010) (applying this principle to reply memoranda). We are satisfied, therefore, that the district court did not abuse its discretion by denying this request outright.

Appellant simply failed to provide adequate justification for his claim that a severance was warranted. He was not entitled to an ex parte examination of his evidence; he was not entitled to deferral of the district court's ruling. Accordingly, we affirm the denial of Appellant's motion to sever.

B.

Voir Dire

Appellant next argues that the district court failed to adequately question prospective jurors on the subject of pretrial publicity. He complains that, during the voir dire proceedings, the court declined his request for individual questioning on this topic. Instead, the court polled the members of the venire as a group, asking whether any of them believed themselves to be incapable of "put[ting] aside whatever it is that [they had] heard." J.A. 1692. The court did call eight prospective jurors to the bench for one-on-one questioning, but only after the defense singled them out on the basis of their responses to a jury selection questionnaire. Appellant argues that such "perfunctory" questioning violated his Sixth Amendment right to an impartial jury. Appellant's Br. 65. Because "[t]he conduct of voir dire necessarily is committed to the sound discretion of the trial court,"

United States v. Lancaster, 96 F.3d 734, 738 (4th Cir. 1996) (en banc), we also review this contention for abuse of discretion, *see United States v. Caro*, 597 F.3d 608, 613 (4th Cir. 2010).

Appellant's argument begins inauspiciously, with an assertion that the Supreme Court's decision in *Skilling v. United States*, 130 S. Ct. 2896 (2010), establishes minimum requirements for voir dire in "publicity-saturated" cases like this one. Appellant's Br. 22. In *Skilling*, he claims, the Court approved the voir dire procedure "only because" the trial court asked prospective jurors to indicate whether they had formed an opinion about the defendant's guilt or innocence and later examined them individually about pretrial publicity. *Id.* Appellant then reasons that, because the trial court in this case took neither of those steps, it necessarily "failed to 'provide a reasonable assurance that prejudice would be discovered if present.'" *Id.* (quoting *Lancaster*, 96 F.3d at 740).

Skilling, however, does not purport to hand down commandments for the proper conduct of voir dire proceedings. See 130 S. Ct. at 2918 (explaining that the legal issue under review was, narrowly, "the adequacy of jury selection *in Skilling's case*" (emphasis supplied)). On the contrary, the Court in *Skilling* recommitted itself to the principle that jury selection is unsusceptible to any "hard-and-fast formula"; as always, it remains "particularly within the province of the trial judge." *Id.* at 2917 (internal quotation marks omitted); *see also United States v. Wood*, 299 U.S. 123, 145-46 (1936) (stating that procedures for detecting and rooting out juror bias cannot be "chained to any ancient and artificial

formula"). Trial judges, as we have repeatedly recognized, retain broad discretion over the conduct of voir dire, *see, e.g.*, *United States v. Jeffery*, 631 F.3d 669, 673 (4th Cir. 2011), both as a general matter and in the area of pretrial publicity, specifically, *see, e.g.*, *United States v. Bailey*, 112 F.3d 758, 770 (4th Cir. 1997); *United States v. Bakker*, 925 F.2d 728, 733-34 (4th Cir. 1991). The Supreme Court has itself emphasized the "wide discretion" that trial courts enjoy in questioning prospective jurors about pretrial publicity:

> Particularly with respect to pretrial publicity, we think this primary reliance on the judgment of the trial court makes good sense. The judge of that court sits in the locale where the publicity is said to have had its effect and brings to his evaluation of any such claim his own perception of the depth and extent of news stories that might influence a juror. The trial court, of course, does not impute his own perceptions to the jurors who are being examined, but these perceptions should be of assistance to it in deciding how detailed an inquiry to make of the members of the jury venire.

Mu'Min v. Virginia, 500 U.S. 415, 427 (1991).

In his opening brief, Appellant accuses the district court of "limit[ing] voir dire on this issue to asking the prospective jurors en masse to sit down if they felt they could be fair." Appellant's Br. 65. The court, though, did a good deal more than that.

Jury selection in this case commenced with a court-approved jury questionnaire spanning 99 questions,

four of which pressed prospective jurors for information about their exposure to pretrial publicity.[11] The questionnaire—by and large, a condensed version of a slightly longer proposed questionnaire that the parties submitted jointly—asked respondents to state whether they had "seen, heard or read anything" about the case; "[h]ow closely" they had followed news about the case; and from which types of media they had heard about it. J.A. 592-93. It then asked whether each respondent had "expressed an opinion about this case or about those involved to anyone," and if so, to elaborate on both "the circumstances" and the opinion expressed. *Id.* at 593.

Appellant makes much of the fact that the jury questionnaire merely asked whether prospective jurors had "expressed" an opinion about the case, rather than whether they had formed an opinion about it. Appellant, however, bears much of the responsibility for the wording and scope of questions on that document. And while the jointly proposed jury questionnaire from which the final questionnaire was culled did, indeed, ask whether prospective jurors had "formed" an opinion about the case, the wording of this proposed question was suspect. It asked: "Based on what you have read, heard, seen, and/or overheard in conversations, please tell us what opinions, if any, you have formed about the guilt or innocence of Robert F. McDonnell." J.A. 527

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[11] Another section of the questionnaire asked prospective jurors to discuss their news consumption more generally. Respondents were instructed to list, among other things, the print and online news sources they read most often and any websites they visit regularly.

So worded, this question invites respondents to deliberate on the defendant's guilt or innocence and to stake out a position before even a single juror has been seated. The court was justified in rejecting it.[12]

Later, the court did exercise its discretion to question the prospective jurors as a group, instead of individually, on the subject of pretrial publicity. *See Bakker*, 925 F.2d at 734 ("[I]t is well established that a trial judge may question prospective jurors collectively rather than individually."). During this portion of the in-court voir dire, the court asked the members of the venire, collectively, to stand up if they had read, heard, or seen any media reports about the case. The court then asked the prospective jurors to sit down if, despite this, they believed they were "able to put aside whatever it is that [they] heard, listen to the evidence in this case and be fair to both sides." J.A. 1691-92. Even still, the court invited defense counsel to identify any specific veniremen it would like to question further on this subject. In response, Appellant's counsel brought

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[12] Indeed, the court's decision not to pose Appellant's suggested question finds support in the Supreme Court's guidance on matters of pretrial publicity. *See Mu'Min*, 500 U.S. at 430 (explaining that the question for voir dire is "whether the jurors had such *fixed* opinions that they could not judge impartially the guilt of the defendant" (alteration in original) (emphasis supplied) (internal quotation marks omitted)); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) ("To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.").

forward the names of eight prospective jurors, and the court proceeded to summon each of those prospective jurors to the bench for individual questioning. The court struck one of these individuals, without objection, based on her responses to its questions. When this process was complete, the court asked Appellant's counsel whether there was "[a]nybody else" he wished to question. J.A. 1706. "Not on publicity," counsel said. *Id.*

Appellant, relying on our decision in *United States v. Hankish*, 502 F.2d 71 (4th Cir. 1974), argues that the prospective jurors' acknowledgment that they had been exposed to pretrial publicity obligated the trial court to question every single one of them—not merely one at a time, but outside of the others' presence. *See* Appellant's Br. 65. *Hankish*, however, is inapplicable. The error in that case was a district court's refusal to poll jurors, after they had already been seated, to discern whether any of them had read a particular, "highly prejudicial" article that ran in the local newspaper on the second day of the trial. 502 F.2d at 76. We did not hold then, and have not held since, that individual questioning, out of earshot of the rest of the venire, is required to alleviate generalized concerns about the pernicious effects of pretrial publicity. On the contrary, we have held that merely asking for a show of hands was not an abuse of discretion. *See Bailey*, 112 F.3d at 769-70 (finding no abuse of discretion where a court asked prospective jurors to raise their hands if they had heard or read about the case and, separately, if "anything they had heard would predispose them to favor one side or the other").

We are satisfied that the trial court's questioning in this case was adequate to "provide a reasonable assurance that prejudice would be discovered if present." *Lancaster*, 96 F.3d at 740 (internal quotation marks omitted); *see also United States v. Hsu*, 364 F.3d 192, 203-04 (4th Cir. 2004). And Appellant does not contend that any actual juror bias has been discovered. We conclude, therefore, that the court did not abuse its discretion.

C.

Evidentiary Rulings

Appellant asserts the district court made multiple erroneous evidentiary rulings. In general, we review evidentiary rulings for an abuse of discretion, affording substantial deference to the district court. *See United States v. Medford*, 661 F.3d 746, 751 (4th Cir. 2011). "A district court abuses its discretion if its conclusion is guided by erroneous legal principles or rests upon a clearly erroneous factual finding." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999) (citations omitted). Reversal is appropriate if we have "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Id.* (internal quotation marks omitted).

1.

Exclusion of Expert Testimony

Appellant objects to the exclusion of his proposed expert testimony about Williams's cooperation agreement with the Government as well as expert testimony about the Statements of Economic Interest.

We reject these claims, as the trial court's decisions to exclude this evidence were not abuses of discretion.

a.

First, Appellant argues that he should have been permitted to present expert testimony about Williams's cooperation agreement with the Government, which provided Williams with transactional immunity. In a letter dated May 30, 2014, the Government outlined the immunized conduct:

> (1) conduct involving his agreement to provide, and his provision of, things of value to former Virginia Governor Robert F. McDonnell, former First Lady of Virginia Maureen P McDonnell, and their family members; (2) conduct related to loans Williams received from 2009 to 2012 in exchange for his pledge of Star Scientific stock; and (3) conduct related to Williams' gifts of Star Scientific stock to certain trusts from 2009 to 2012.

J.A. 7918. Appellant offered the expert testimony of Peter White—a partner at Schulte Roth & Zabel LLP and former Assistant United States Attorney—to "explain[] transactional immunity, its value, and its uniqueness" and to "help[] the jury understand Williams's deal so it could assess his credibility." Appellant's Br. 78.

Expert testimony cannot be used for the sole purpose of undermining a witness's credibility. *See United States v. Allen*, 716 F.3d 98, 105—06 (4th Cir. 2013). Here, the defense wished to present White's testimony in order to emphasize the rarity of Williams's agreement and to imply, as a result, that Williams had more reason to provide false or greatly

exaggerated testimony. In other words, the sole purpose of White's testimony was to undermine Williams's credibility. This is a matter best left to cross examination. Accordingly, we cannot conclude that the district court's decision to exclude this evidence was an abuse of discretion. *See Allen*, 716 F.3d at 106 ("A juror can connect the dots and understand the implications that a plea agreement might have on a codefendant's testimony—it is certainly within the realm of common sense that certain witnesses would have an incentive to incriminate the defendant in exchange for a lower sentence." (internal quotation marks omitted)).[13]

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[13] Appellant also contests the exclusion of his proposed lay witness testimony about the rarity of Williams's agreement. At trial, the court sustained the Government's objection after defense counsel asked Williams whether he understood "how unusual it is to get transactional immunity" and again after defense counsel asked an FBI special agent whether he had "ever seen a cooperating witness get the kind of deal that Mr. Williams got." J.A. 2778, 5064. Appellant claims this testimony would have helped the jury assess Williams's credibility. In relevant part, Rule 701 of the Federal Rules of Evidence requires that opinion testimony from a lay witness must be "helpful to clearly understanding the witness's testimony." Fed. R. Evid. 701(b); *see also United States v. Hassan*, 742 F.3d 104, 136 (4th Cir. 2014) ("Lay opinion testimony is particularly useful when the terms and concepts being discussed are likely to be unfamiliar to the jury."). Juries are familiar with the general import and effect of immunity agreements. *Cf. Allen*, 716 F.3d at 106 (discussing jurors' ability to understand the implications of a plea agreement). Here, the jury was informed of the contents of Williams's agreement, and Williams testified about the agreement and his understanding of the immunities from prosecution it afforded him. The jury did not need additional testimony regarding what types of agreements are more common than others to assess Williams's credibility.

b.

Second, Appellant argues that he should have been permitted to present expert testimony about the Statements of Economic Interest. Appellant offered the expert testimony of Norman A. Thomas—a private attorney who formerly worked in the Office of the Attorney General of Virginia and served as a judge—to explain the vagueness and complexity of the Statements of Economic Interest. According to Appellant, Thomas also would have explained that Appellant's Statements of Economic Interest evidenced a reasonable understanding of the disclosure requirements.

Expert testimony must "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). "The helpfulness requirement of Rule 702 thus prohibits the use of expert testimony related to matters which are obviously within the common knowledge of jurors." *United States v. Lespier*, 725 F.3d 437, 449 (4th Cir. 2013) (alteration in original) (internal quotations marks omitted).

The district court excluded the testimony of Thomas because it would not be helpful to the jury. As the court observed, the jurors were "capable of reading and assessing the complexity of the [Statements] for themselves." J.A. 719. Generally speaking, one does not need any special skills or expertise to recognize that something is complex. Accordingly, this matter was plainly within the common knowledge of the jurors. Similarly, the

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In other words, the district court reasonably concluded that the testimony would not have been helpful.

jurors did not need expert assistance to assess the reasonableness of Appellant's opinions about what he did and did not have to disclose. The district court reasonably concluded that Thomas's testimony would not have been helpful. As a result, we cannot conclude that the district court's decision to exclude this evidence was an abuse of discretion.

2.

Admission of Statements of Economic Interest

Appellant objects to the admission of the Statements of Economic Interest filed by Appellant during his time in office. Appellant moved in limine to exclude evidence relating to the Statements of Economic Interest, arguing the Statements of Economic Interest would have little to no probative value and their admission would confuse the issues and mislead the jury.

The Government, on the other hand, characterized the Statements of Economic Interest and related evidence as concealment evidence, which would reveal Appellant's "corrupt intent and consciousness of guilt." J.A. 723. In support of this proposition, the Government offered four examples of how the Statements of Economic Interest amounted to concealment evidence:

> [F]irst, because of [Appellant's] deliberate omission of his golf-related gifts paid by Jonnie Williams; second, because of [Appellant's] deliberate omission of the $15,000 check from Mr. Williams to pay the remainder of the catering bill the McDonnells owed for their daughter's wedding; third, as the reason why Mrs. McDonnell sold and repurchased all Star

> stock held in her account on dates flanking the due date for [Appellant's] 2011 [Statement of Economic Interest], and why the next year, she similarly unloaded Star stock to [Appellant's] children on December 26, 2012, such that less than $10,000 worth of Star stock remained in her account at year-end; and fourth, as the reason why [Appellant] had Mr. Williams direct $70,000 in loan proceeds to [Mobo].

Id. at 723-24 (citations omitted).

Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401(a)—(b). Relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.* 403.

The district court admitted the Statements of Economic Interest because they were relevant "to concealment and may be probative of intent to defraud" and because "admission will not unfairly prejudice [Appellant] because there is no suggestion, and there will be none at trial, that [Appellant] violated Virginia's ethics laws or reporting requirements." J.A. 760. Indeed, an attempt to conceal actions may indicate an individual has a guilty conscience or is aware of the unlawfulness of the actions. *See United States v. Zayyad*, 741 F.3d 452, 463 (4th Cir. 2014). Because the Statements of Economic Interest did not include various gifts, stock transactions, and loans from Williams to Appellant—omissions Appellant sought to explain during

trial[14]—the structuring of the loans and gifts and failures to report could be seen as efforts to conceal Appellant's dealings with Williams. The district court correctly observed as much. And the district court weighed the probative value of this evidence against any dangers that would accompanying its admission. Accordingly, we cannot conclude that the district court's decision to admit this evidence was an abuse of discretion.

3.

Admission of Other Gifts Evidence

Appellant objects to the admission of evidence that he accepted a gift of the Kiawah vacation from Goodwin and that he did not disclose this gift pursuant to the "personal friend" exception to Virginia's reporting requirements. Appellant moved in limine to exclude this evidence as extrinsic evidence of unrelated alleged acts with no probative

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[14] Appellant testified that he should have reported—but did not report—golf outings provided by Williams in 2011. He did not report Williams's $15,000 check for catering at Appellant's daughter's wedding, characterizing the check as a wedding gift to his daughter. Appellant instructed Williams to write loan checks to Mobo, circumventing disclosure requirements. In both 2011 and 2012, Mrs. McDonnell unloaded shares of Star stock prior to the filing dates for the Statements of Economic Interest so her ownership did not have to be reported. But after the 2011 Statement of Economic Interest was filed, Mrs. McDonnell repurchased shares of Star stock. Appellant testified that "it was not a big deal" if he had to report ownership of Star stock. J.A. 6276. He claimed that he encouraged his wife to sell the stock in 2011 because it was a risky investment. He also claimed that Mrs. McDonnell repurchased and again transferred Star stock in 2012 because she wanted to give the stock to their children as a Christmas present.

value of his intent. The Government responded that this evidence showed Appellant's knowledge of the "personal friend" exception to reporting requirements. This evidence, the Government further noted, would be "competent evidence of absence of mistake or lack of accident when it comes to assessing [Appellant's] intent in failing to disclose the gifts and loans from Mr. Williams." J.A. 731.

As a general rule, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). However, such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* 404(b)(2).

The district court admitted the evidence of the Kiawah vacation omission because it was used to show knowledge and lack of mistake. The omission of the gift from Goodwin, the district court determined, "is similar to the act the Government seeks to prove—omission of gifts from Williams pursuant to the personal friend exception." J.A. 761. This evidence established that Appellant knew about the "personal friend" exception and omitted certain gifts pursuant to this exception. Thus, Appellant's knowledge and the absence of mistake was "relevant to, and probative of, his alleged intent to defraud." *Id.* Rule 404 permits the admission of evidence of intent and knowledge, and in our view, the district court could conclude that the Goodwin evidence was admissible for these purposes. Therefore, we cannot

conclude that the district court's decision to admit this evidence was an abuse of discretion.

4.

Admission of Email Exchange Regarding Free Golf

Appellant objects to the admission of an email exchange about obtaining free rounds of golf. On January 4, 2013, Emily Rabbitt—Appellant's travel aide and deputy director of scheduling—asked Adam Zubowsky for advice about planning golf trips for Appellant. Zubowsky—once Appellant's travel aide and later Appellant's son-in-law—responded in an email dated January 4, 2013:

> Yes basically this means find out who we know in these cities, that owns golf courses and will let me and my family play for free, or at a reduced cost. Also finding out where to stay for free / or reduced cost. So this means find out about pac donors, and rga donors, who will host rfm.

J.A. 7921.

During trial, Appellant objected to the admission of this email, asserting that this evidence was not relevant and was extraordinarily prejudicial. In post-trial motions and on appeal, however, Appellant has claimed the exchange was inadmissible hearsay and inadmissible character evidence. Because Appellant did not object at trial on these grounds, our review is for plain error. *See United States v. Bennett*, 698 F.3d 194, 200 (4th Cir. 2012).

On plain error review, an appellant "bears the burden of establishing (1) that the district court erred; (2) that the error was plain; and (3) that the error

affect[ed his] substantial rights." *Bennett*, 698 F.3d at 200 (alteration in original) (internal quotation marks omitted). An error affects an individual's substantial rights if it was prejudicial, "which means that there must be a reasonable probability that the error affected the outcome of the trial." *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010). The mere possibility that the error affected the outcome of the trial does not establish prejudice. *See id.* "Even then, this court retain[s] discretion to deny relief, and denial is particularly warranted where it would not result in a miscarriage of justice." *Bennett*, 698 F.3d at 200 (alteration in original) (internal quotation marks omitted).

At first, the district court refused to permit discussion of the particular email exchange when it was mentioned during the testimony of Rabbitt. Later in the trial, during cross examination of Appellant, the email exchange was admitted over Appellant's relevancy objection. The discussion of the exchange focused on whether Appellant received information about golf courses where he could play for free or at a reduced cost. Upon review of the record, it does not appear that this exchange was mentioned again, and the parties have not identified any other discussion of the exchange.

The use of the email exchange was quite limited, especially in light of the voluminous evidence presented during the course of the five weeks of trial. We cannot say there is a reasonable probability that its admission affected the outcome of the trial. The indictment, we note, did not seek to prosecute Appellant for this conduct; indeed, the district court instructed the jury that Appellant was "not on trial

for any act or conduct or offense not alleged in the indictment." J.A. 7695. We presume the jurors followed the district court's instruction. *See, e.g.*, *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Accordingly, the claim that evidence of the email exchange affected the outcome of the trial is beyond the realm of reasonable probability. The admission of this evidence was not plainly erroneous.

5.

Return of Forensic Image of Williams's iPhone

Appellant also asserts the district court erroneously ordered him to return all copies of a forensic image of Williams's iPhone, which the Government had produced to Appellant pursuant to Rule 16 of the Federal Rules of Criminal Procedure. Appellant's chief complaint is that the forensic image may contain evidence to which he is entitled pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

However, Appellant waives this claim because his treatment of it is conclusory. Appellant merely argues: "If [Appellant] receives a new trial, he is entitled to this evidence, which almost certainly contains *Brady* and *Giglio* material. Likewise, if any of that evidence proves material, its confiscation requires a new trial." Appellant's Br. 85 (citations omitted). Appellant's argument includes bare citations to two decisions of little obvious relevance from other courts of appeals. Furthermore, Appellant does not make any effort to establish the elements of a *Brady* or *Giglio* violation. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) ("The evidence at issue must be favorable to the accused, either because it is

exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.").

Summary treatment of a claim does not sufficiently raise the claim. *See, e.g.*, *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 396 n.* (4th Cir. 2014) (noting that failure to present legal arguments and "record citations or pertinent legal authority supporting a claim" waives the claim). Although Appellant raised this issue in an interlocutory appeal in a related case—an appeal we dismissed for want of jurisdiction—this does not preserve the issue and is not sufficient to raise the issue now. To avoid waiver, a party must brief the issue in an appeal over which we may exercise jurisdiction. Thus, because Appellant fails to sufficiently raise this issue and has, therefore, effectively waived it, we do not further address it.

III.

With these matters resolved, we turn to the two arguments at the core of this appeal. First and foremost, Appellant asserts that the district court's jury instructions misstated fundamental principles of federal bribery law. Second, he asserts that the Government's evidence was insufficient to support his convictions pursuant to the honest-services wire fraud statute and the Hobbs Act. We address each of these contentions in turn.

A.

Jury Instructions

Appellant's claim with respect to the jury instructions is that the court defined bribery far too

expansively. "We review de novo the claim that a jury instruction failed to correctly state the applicable law." *United States v. Jefferson*, 674 F.3d 332, 351 (4th Cir. 2012). "[W]e do not view a single instruction in isolation, but instead consider whether taken as a whole and in the context of the entire charge, the instructions accurately and fairly state the controlling law." *United States v. Woods*, 710 F.3d 195, 207 (4th Cir. 2013) (internal quotation marks omitted). Even if, upon review, we find that the court misinstructed the jury on an element of an offense, we may disregard the error as harmless. *See United States v. Cloud*, 680 F.3d 396, 408 n.5 (4th Cir. 2012); *United States v. Ramos-Cruz*, 667 F.3d 487, 496 (4th Cir. 2012). "We find an error in instructing the jury harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'"[15] *Ramos-Cruz*, 667 F.3d at 496 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)).

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[15] Prior to closing arguments in this case, the trial court conducted a lengthy charge conference, during which Appellant's counsel vigorously challenged many of the Government's proposed instructions, including instructions that the court ultimately gave. The court did not invite the parties to object to the instructions after the court gave them to the jury—nor did either party request to do so. We remind the district courts and counsel that the proper time for cementing objections to instructions is after they are given but "before the jury retires to deliberate." Fed R. Crim. P 30(d); *see United States v. Taglianetti*, 456 F.2d 1055, 1056-57 (1st Cir. 1972) (rejecting the "improper practice" of taking objections to the jury charge "in chambers before delivery, rather than afterwards").

1.

We begin our analysis with an examination of the statutes of conviction. The first of these is the honest-services wire fraud statute, 18 U.S.C. §§ 1343, 1346.[16] This statute requires the Government to prove that the defendant sought to "carry out a 'scheme or artifice to defraud' another of 'the intangible right of honest services.'" *United States v. Terry*, 707 F.3d 607, 611 (6th Cir. 2013) (citations omitted) (quoting 18 U.S.C. §§ 1341, 1346). The Supreme Court has recognized that § 1346 proscribes two, and only two, types of activities: bribery and kickback schemes. *See Skilling v. United States*, 130 S. Ct. 2896, 2907 (2010). To the extent that the statute prohibits acts of bribery, the prohibition "draws content from federal statutes proscribing—and defining—similar crimes," including the general federal bribery statute, 18 U.S.C. § 201(b), and the statute prohibiting theft and bribery involving federal funds, 18 U.S.C. § 666(a)(2). *Skilling*, 130 S. Ct. at 2933.

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[16] The wire fraud statute provides, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, transmits or causes to be transmitted by means of wire communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined or imprisoned or both.

18 U.S.C. § 1343. "[T]he term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." *Id.* § 1346.

Here, in their proposed instructions for honest-services wire fraud, both parties sought to import the definition of bribery set forth in 18 U.S.C. § 201(b)(2). This statute provides that public officials may not "corruptly" demand, seek, or receive anything of value "in return for being influenced in the performance of any official act." 18 U.S.C. § 201(b)(2). The statute defines an "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." *Id.* § 201(a)(3). The district court provided a near-verbatim recitation of these provisions in its honest-services wire fraud instructions.

A second statute of conviction in Appellant's case, the Hobbs Act, prohibits acts of extortion which "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a). Though a defendant may commit extortion through threats or violence, it is also possible to commit extortion by obtaining property "under color of official right." *Id.* § 1951(b)(2). In *Evans v. United States*, the Supreme Court explained that its construction of § 1951 "is informed by the common-law tradition," under which "[e]xtortion by [a] public official was the rough equivalent of what we would now describe as 'taking a bribe.'" 504 U.S. 255, 260, 268 (1992). Accordingly, we have concluded that prosecutions for extortion under color of official right, like prosecutions under other bribery-related statutes,

require proof of a quid pro quo. *See United States v. Hairston*, 46 F.3d 361, 365 (4th Cir. 1995).

Here, the parties agreed that a charge of extortion under color of official right has four elements. The trial court accordingly instructed the jury that the Government must prove beyond a reasonable doubt that the defendant (1) was a public official; (2) "obtained a thing of value not due him or his [office]"; (3) "did so knowing that the thing of value was given in return for official action"; and (4) "did or attempted in any way or degree to delay, obstruct, or affect interstate commerce, or an item moving in interstate commerce." J.A. 7681.

2.

Official Acts

Appellant first challenges the district court's instructions on the meaning of "official act," or, alternatively, "official action." Appellant argues the court's definition was overbroad, to the point that it would seem to encompass virtually any action a public official might take while in office.

In its instructions on honest-services wire fraud, the district court defined "official action":

> The term official action means any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such public official's official capacity. Official action as I just defined it includes those actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to

> responsibilities explicitly assigned by law. In other words, official actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description. And a public official need not have actual or final authority over the end result sought by a bribe payor so long as the alleged bribe payor reasonably believes that the public official had influence, power or authority over a means to the end sought by the bribe payor. In addition, official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.

J.A. 7671-72. The court later explained to the jury that these instructions "apply equally to the definition of official action for the purposes of" the Hobbs Act counts. *Id.* at 7683.

In broad strokes, Appellant's argument is that the court's definition of "official action" is overinclusive. By his account, the court's instructions would deem virtually all of a public servant's activities "official," no matter how minor or innocuous. For public figures such as a governor, who interact with constituents, donors, and business leaders as a matter of custom and necessity, these activities might include such routine functions as attending a luncheon, arranging a meeting, or posing for a photograph. Appellant argues that activities of this nature can never constitute an official act. *See* Appellant's Br. 28.

We have recognized that the term "official act" "does not encompass every action taken in one's

official capacity." *Jefferson*, 674 F.3d at 356. Its meaning is more limited than that. We are satisfied, though, that the district court adequately delineated those limits when it informed the jury that the term "official act" covers only "decision[s] or action[s] on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such public official's official capacity." J.A. 7671 (paraphrasing 18 U.S.C. § 201(a)(3)).

a.

The Supreme Court has twice expounded on the meaning of "official act." It first did so a little more than a century ago, in *United States v. Birdsall*, 233 U.S. 223 (1914). There, two federal officers responsible for suppressing liquor traffic in Indian communities challenged their indictments for accepting bribes in violation of section 117 of the Criminal Code, the predecessor statute to 18 U.S.C. § 201(b).[17] *See Birdsall*, 233 U.S. at 227 The

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[17] Section 117 provided:

> Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof[,] shall ask, accept, or receive any money, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be [penalized by fine, imprisonment, and disqualification from office].

indictments alleged that attorney Birdsall bribed the officers to advise the Commissioner of Indian Affairs to recommend leniency for individuals convicted of liquor trafficking offenses involving Indians. *See id.* at 229-30. The district court sustained the officers' demurrers, holding that their actions were not within the scope of the bribery statute because "there [was] no act of Congress conferring upon the Interior Department, or the Bureau of Indian Affairs, any duty whatever in regard to recommending to the executive or judicial departments of the government whether or not executive or judicial clemency shall be extended." *United States v. Birdsall*, 206 F 818, 821 (N.D. Iowa 1913), *rev'd*, 233 U.S. 223 (1914). The Supreme Court, however, reversed. In doing so, it declared that an action may be "official" for purposes of a bribery charge even if it is not prescribed by statute, written rule, or regulation. *See Birdsall*, 233 U.S. at 230-31. Indeed, as the Court explained, an official act:

> might also be found in an established usage which constituted the common law of the department and fixed the duties of those engaged in its activities. In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery.

Act of March 4, 1909, ch. 321, § 117, 35 Stat. 1088, 1109-10. We have observed that "there is simply no distinction in substance between an official act as defined by *Birdsall*" and an "official act" under the current bribery statute, 18 U.S.C. § 201(a)(3). *Jefferson*, 674 F.3d at 353.

Id. at 231 (citation omitted).

Birdsall continues to stand for the proposition that an "official act" "may include acts that a [public servant] customarily performs, even if the act falls outside the formal legislative process." *Jefferson*, 674 F.3d at 357; *see also United States v. Morlang*, 531 F.2d 183, 192 (4th Cir. 1975). Importantly. though, *Birdsall* did not rule, and we have never held, that every act an official performs as a matter of custom is an "official act." To constitute an "official act" under federal bribery law, a settled practice "must yet adhere to the definition confining an official act to a pending 'question, matter, cause, suit, proceeding or controversy.'" *Jefferson*, 674 F.3d at 356 (quoting 18 U.S.C. § 201(a)(3)).

By way of dicta in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999), the Supreme Court has clarified this point. *Sun-Diamond*, it must be noted, was not a bribery case. Its focus, rather, was the federal gratuity statute, 18 U.S.C. § 201(c), which criminalizes gifts given to a public official "for or because of any official act." 18 U.S.C. § 201(c)(1)(A). Notably, though, the definition of an "official act" supplied in § 201(a)(3) applies to the entirety of § 201, including the dual prohibitions on bribery and illegal gratuities. *See* 18 U.S.C. § 201(a) (providing a definition of "official act" "[f]or the purpose of this section").

The *Sun-Diamond* Court explained that the illegal gratuity statute requires the Government to demonstrate a link between the gift and "some particular official act of whatever identity." 526 U.S. at 406 (internal quotation marks omitted). In the course of its explanation, the Court stated that an

alternative reading would criminalize, for example, "token gifts to the President based on his official position and not linked to any identifiable act—such as the replica jerseys given by championship sports teams each year during ceremonial White House visits"; "a high school principal's gift of a school baseball cap to the Secretary of Education, by reason of his office, on the occasion of the latter's visit to the school"; or a "complimentary lunch" provided for the Secretary of Agriculture "in connection with his speech to the farmers concerning various matters of USDA policy." *Id.* at 406-07 The Court proceeded to explain why it would not do to argue that these three acts—that is, receiving the sports teams, visiting the high school, or speaking to farmers—were "official acts" in their own right:

> The answer to this objection is that those actions—while they are assuredly "official acts" in some sense—are not "official acts" within the meaning of the statute, which, as we have noted, defines "official act" to mean "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3). Thus, when the violation is linked to a particular "official act," it is possible to eliminate the absurdities through the definition of that term.

Id. at 407-08 (emphasis omitted).

We have previously declined to read *Sun-Diamond* to exclude "*all* settled practices by a public official

from the bribery statute's definition of an official act." *Jefferson*, 674 F.3d at 356 (emphasis supplied). Appellant concedes the point, acknowledging that "some settled practices can be official acts." Appellant's Br. 37 (emphasis omitted). He argues, though, that under the logic of *Sun-Diamond*, the kinds of activities he is accused of—e.g., speaking with aides and arranging meetings—can never constitute "official acts" because they "implicate no official power." [18] *Id.* at 31 (emphasis omitted). Appellant simply misreads *Sun-Diamond*.

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[18] In further support of his argument that an "official act" necessitates a deployment of "official powers," Appellant calls our attention to the First Circuit's decision in *United States v. Urciuoli*, 513 F.3d 290 (1st Cir. 2008). The appellants in *Urciuoli* were hospital executives who allegedly employed a state senator in a "sham job" in exchange for various efforts to advance the hospital's financial interests. 513 F.3d at 292. In pertinent part, the Government alleged that the senator lobbied municipal officials to comply with Rhode Island law governing ambulance runs. *See id.* As a result of this act, among various other actions, the executives were convicted of honest-services mail fraud pursuant to 18 U.S.C. §§ 1341 and 1346. *See id.* at 293.

There, as in this case, the chief issue on appeal was whether the court's instructions were overbroad. It must be noted, though, that the instructions in that case were decidedly different than the instructions here. Instead of borrowing the bribery definition from § 201(a)(3), as the court here did, the trial court in *Urciuoli* instructed the jury to decide whether the object of the scheme was a deprivation of "honest services," defined as follows:

> The honest services that an elected official owes to citizens is not limited to the official's formal votes on legislation. It includes the official's behind-the-scenes activities and influence in the legislation, and it also includes other actions

The *Sun-Diamond* Court did not rule that receptions, public appearances, and speeches can never constitute "official acts" within the meaning of § 201(a)(3); the Court's point was that job functions of a strictly ceremonial or educational nature will rarely, if ever, fall within this definition. The reason is not that these functions cannot *relate*, in some way, to a "question, matter, cause, suit, proceeding or controversy." 18 U.S.C. § 201(a)(3). Frequently, they will. When, as in the Court's example, the Secretary of Education visits a local high school, he may proceed to discuss matters of education policy with the student body. Surely, though, this discussion does not have the purpose or effect of exerting some influence on those policies. Its function, rather, is to educate an audience of students. Under these circumstances, it cannot be said that the Secretary's visit is a "'decision or action on'" the question, matter, cause, suit, proceeding, or controversy. *Sun-Diamond*, 526 U.S. at 407 (emphasis supplied) (quoting 18 U.S.C. § 201(a)(3)).

In view of these precedents, we are satisfied that the reach of § 201(a)(3) is broad enough to encompass the customary and settled practices of an office, but

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> that the official takes in an official capacity, not what he does as a private individual but what he does under the cloak of his office.

Urciuoli, 513 F.3d at 295 n.2 (internal quotation marks omitted). The First Circuit ruled that the phrase "under the cloak of his office" was overbroad under the circumstances because lobbying mayors *to obey state law* cannot constitute a deprivation of honest services. *See id.* at 295. While Appellant reads *Urciuoli* to proclaim that acts like lobbying can never be official acts, the First Circuit made no such pronouncement.

only insofar as a purpose or effect of those practices is to influence a "question, matter, cause, suit, proceeding or controversy" that may be brought before the government. 18 U.S.C. § 201(a)(3). It is with this principle in mind that we assess Appellant's contentions about the jury instructions in this case.[19]

b.

Appellant accuses the district court of giving the jury an "unprecedented and misleading" instruction on the "official act" element. Appellant's Br. 51. We disagree with these characterizations. First, the court's instruction was not unprecedented. To a large extent, the instruction echoed the "official act" instruction in *United States v. Jefferson*.[20] Second,

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[19] Appellant invokes a number of canons of statutory interpretation that favor a narrow construction of "official act." As for his argument that the bribery laws should be void for vagueness, the Supreme Court has already rejected a challenge that the honest-services statute is unconstitutionally vague as applied to bribery. *See Skilling*, 130 S. Ct. at 2928. And because Appellant has "engage[d] in some conduct that is clearly proscribed" by the Hobbs Act, he "cannot complain of the vagueness of the law as applied to the conduct of others." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010) (internal quotation marks omitted). Appellant's remaining narrowing arguments—which invoke federalism concerns, the rule of lenity, and dicta in *Sun-Diamond*—all presuppose inherent ambiguity in the statutory term "official act." However, as we have explained, the term is sufficiently definite as to make recourse to those canons unnecessary.

[20] In *Jefferson*, we held that the following jury instruction was not erroneous: "An act may be official even if it was not taken pursuant to responsibilities explicitly assigned by law. Rather, official acts include those activities that have been clearly established by settled practice as part of a public official's position." 674 F.3d at 353 (alteration omitted).

the instruction here was not misleading. The court correctly stated, consistent with *Birdsall*, that the term "official action" "includes those actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law." J.A. 7671 72. The court then explained that the meaning of "official action" is tethered to decisions or actions on a "question, matter, cause, suit, proceeding, or controversy" that may come before the government. *See id.* at 7671.

i.

Appellant takes issue with the court's instruction that an official action "'can include actions taken in furtherance of longer-term goals.'" Appellant's Br. 56 (quoting J.A. 7672). He argues that this instruction is too sweeping, as "virtually anything could be in 'furtherance' of some goal." *Id.* For similar reasons, Appellant challenges the court's instruction that "'an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.'" *Id.* (emphasis omitted) (quoting J.A. 7672). We find no error in either of the court's statements.

We observe, first, that the federal bribery statute, 18 U.S.C. § 201(b), from which the honest-services wire fraud statute draws meaning, criminalizes the act of "corruptly demand[ing], seek[ing], receiv[ing], accept[ing], or agree[ing] to receive or accept" a thing of value in return for influence. 18 U.S.C. § 201(b)(2). The solicitation or acceptance of the bribe completes the crime, regardless of whether the recipient completes, or even commences, the "official act" the bribe payor sought to influence. *See Howard v. United States*, 345 F.2d 126, 128 (1st Cir. 1965) ("[I]t

has been long established that the crime of bribery is complete upon the acceptance of a bribe regardless of whether or not improper action is thereafter taken."). The same is true of a Hobbs Act extortion charge. *See Evans*, 504 U.S. at 268 (recognizing that the crime of extortion under color of official right is "completed at the time when the public official receives a payment in return for his agreement to perform specific official acts"); *United States v. Loftus*, 992 F.2d 793, 797 (8th Cir. 1993). In either case, when prosecuting a bribe recipient, the Government need only prove that he or she solicited or accepted the bribe in return for performing, or being influenced in, some particular official act. Of importance, the consummation of an "official act" is "not an element of the offense." *Evans*, 504 U.S. at 268.

We further observe that an "official act" may pertain to matters outside of the bribe recipient's control. *See* 18 U.S.C. § 201(a)(3) (providing that an act may be "official" so long as the matter to be decided or acted upon "may by law be brought before *any* public official" (emphasis supplied)). Indeed, in *Birdsall*, the defendant-officers lacked any authority to grant clemency; all they could provide was advice. 233 U.S. at 229-30. Nevertheless, the Supreme Court upheld their bribery indictments. *See id.* at 236. Likewise, in *Sears v. United States*, the First Circuit recognized that government inspectors were performing an "official" function, for purposes of two shoemakers' federal bribery charges, when they accepted payoffs to disregard inadequacies in leather shoes destined for sale to the Army. 264 F 257, 261-62 (1st Cir. 1920). As the court stated:

> The fact that these inspectors acted only in a preliminary or in an advisory capacity, and without final power to reject or accept, does not prevent their duties from being official duties. Final decisions frequently, perhaps generally, rest in large part upon the honesty and efficiency of preliminary advice To sustain the contention of the defendants that these inspectors were not performing an official function would be to rule that the thousands of inspectors employed to advise and assist the government under the contracts for the hundreds of millions of war supplies might be bribed with impunity. To state the proposition is to reject it.

Id.

Our decision in *Jefferson* supports the proposition that mere steps in furtherance of a final action or decision may constitute an "official act." The defendant in that case was a former Louisiana congressman who, as co-chair of the Africa Trade and Investment Caucus and the Congressional Caucus on Nigeria, was "largely responsible for promoting trade" with Africa. 674 F.3d at 357 A jury convicted Jefferson of both bribery and honest-services wire fraud, based in part on allegations that he asked a telecommunications company to hire his family's consulting firm in return for his efforts to promote the company's technology in Africa. *See id.* at 338. Jefferson's efforts on the company's behalf involved a series of trips and meetings. In particular, we explained, "acts performed by Jefferson in exchange for the various bribe payments included, inter alia": "corresponding and visiting with foreign officials";

"[a]ttempting to facilitate and promote" certain business ventures; "[s]cheduling and conducting meetings"; and "seeking to secure construction contracts." *Id.* at 356. We were satisfied that these activities were in keeping with Jefferson's settled practice of serving constituents and promoting trade in Africa and that, accordingly, the jury was "entitled to conclude" that his actions "fall under the umbrella of his 'official acts.'" *Id.* at 357-58.

ii.

Appellant next challenges the district court's instruction that a public official "need not have actual or final authority over the end result sought by a bribe payor so long as the alleged bribe payor reasonably believes that the public official had influence, power or authority over a means to the end sought by the bribe payor." J.A. 7672. Appellant argues that this is a misstatement of law: a bribe payor's subjective belief cannot convert a non-official act into an official one. *See* Appellant's Br. 55. Again, we are unpersuaded.

The first part of the court's instruction is indisputably correct.[21] In *Wilson v. United States*, we held that a bribery conviction will stand regardless of whether the bribe recipient "had actual authority to carry out his commitments under the bribery scheme." 230 F.2d 521, 526 (4th Cir. 1956). There, a jury convicted an adjutant general of soliciting bribes

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[21] Appellant's own proposed jury instructions concede the point, stating that a public official "can perform an 'official act' when it is a settled practice as part of the official's position for him to exercise influence over a government decision even if he does not have authority to make the final decision himself." J.A. 753.

from an insurance salesman in exchange for the right to sell insurance at Fort Jackson—even though the solicitations occurred while the adjutant general was temporarily relieved of his post.[22] *See id.* at 523. We deemed the adjutant general's lack of actual authority "immaterial": "Regardless of his actual authority, it was still within his practical power to influence the regulation of insurance sales as it had formerly been " *Id.* at 526; *cf. United States v. Ring*, 706 F.3d 460, 470 (D.C. Cir. 2013) (holding that a Department of Justice attorney committed an "official act" pursuant to § 201(c) when he forwarded an email to another government official in an effort to expedite a foreign student's visa application, even though the attorney "lacked independent authority to expedite visa applications").

As to the second part of the court's instruction, we have no difficulty recognizing that proof of a bribe payor's subjective belief in the recipient's power or influence over a matter will support a conviction for extortion under color of official right. *See United States v. Bencivengo*, 749 F.3d 205, 212-13 (3d Cir. 2014); *United States v. Blackwood*, 768 F.2d 131, 134-35 (7th Cir. 1985); *United States v. Bibby*, 752 F.2d 1116 (6th Cir. 1985); *United States v. Rabbitt*, 583 F.2d 1014, 1027 (8th Cir. 1978) ("The official need not

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[22] The statute of conviction in *Wilson* was 18 U.S.C. § 202, which authorized penalties for any federal officer or employee who "asks [for], accepts, or receives" a thing of value "with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby." 18 U.S.C. § 202 (1952) (current version at 18 U.S.C. § 201(b) (2012)).

control the function in question if the extorted party possesses a reasonable belief in the official's powers."). As the First Circuit explained in *United States v. Hathaway*, the phrase "under color of official right" "includes the misuse of office to induce payments not due." 534 F.2d 386, 394 (1st Cir. 1976). Accordingly, the "relevant question" when contemplating a prosecution under this statute is simply whether the government official "imparted and exploited a reasonable belief that he had effective influence over" the subject of the bribe. *Id.*

Plainly, Hobbs Act principles support the district court's instruction that a bribe recipient's lack of actual authority over a matter does not preclude "official act" status, "so long as the alleged bribe payor reasonably believes" that the recipient had "influence, power or authority over a means to the end sought." J.A. 7672. We are satisfied, therefore, that this instruction was not erroneous with respect to the Hobbs Act extortion charges.

It is less certain that a bribe payor's subjective belief in the recipient's power or influence will suffice to demonstrate an "official act" for purposes of an honest-services wire fraud charge. The "intangible right of honest services," after all, is a right held by the public. *See United States v. Harvey*, 532 F.3d 326, 333 (4th Cir. 2008). When a government official agrees to influence a matter in exchange for money, that official deprives the public of his "honest, faithful, and disinterested services." *Id.* (internal quotation marks omitted). The third party who pays the government official may be a constituent of the official, but he is no victim, and the honest-services wire fraud statute does not seek to protect him.

Appellant's argument, therefore, that the subjective beliefs of a third party in an honest-services wire fraud case cannot "convert non-official acts into official ones" is debatable. Appellant's Br. 55 (emphasis omitted). This, however, is not an issue that we need to decide. Even if the court's instruction on this point were erroneous, the error would be harmless. *See Ramos-Cruz*, 667 F.3d at 496. As Governor of Virginia, Appellant most certainly had power and influence over the results Williams was seeking. We have no doubt that the jury's verdict on the honest-services wire fraud charge would have been the same even if the instructions required a finding that Appellant had the power to influence a means to the end being sought.

Appellant has thus failed to show that the court's "official act" instructions, taken as a whole, were anything less than a "fair and accurate statement of law." *United States v. Smoot*, 690 F.3d 215, 223 (4th Cir. 2012). Appellant's claim of reversible error with respect to the "official act" instructions is therefore rejected.

c.

We likewise reject Appellant's argument that the court erred in refusing to give his proposed instructions on the meaning of "official act." We review a district court's refusal to give a specific jury instruction for abuse of discretion, "and reverse only when the rejected instruction (1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." *United States v. Smith*, 701

F.3d 1002, 1011 (4th Cir. 2012) (internal quotation marks omitted).

Appellant's proposed instruction contained the following passage:

> [T]he fact that an activity is a routine activity, or a "settled practice," of an office-holder does not alone make it an "official act." Many settled practices of government officials are not official acts within the meaning of the statute. For example, merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, "official acts," even if they are settled practices of the official. A government official's decisions on who[m] to invite to lunch, whether to attend an event, or whether to attend a meeting or respond to a phone call are not decisions on matters pending before the government. That is because mere ingratiation and access are not corruption.

J.A. 753.

This passage is problematic in a number of ways. First, it is hardly evident that "[m]any" settled practices do not qualify as "official acts." J.A. 753. Even if this were so, it is not a statement of law. Rather, it seems to us a thinly veiled attempt to argue the defense's case. Given the risk of misleading the jury, we cannot fault the court for declining to give this instruction.

The court was likewise justified in rejecting Appellant's assertion that "merely arranging a meeting, attending an event, hosting a reception, or making a speech" cannot constitute an "official act."

As detailed above, neither *Sun-Diamond* nor any other precedent sweeps so broadly.

Moving on, Appellant has also failed to explain why the court should have instructed the jury that "decisions on who[m] to invite to lunch, whether to attend an event, or whether to attend a meeting or respond to a phone call are not decisions on matters pending before the government." J.A. 753. Even if we assume that most such decisions would not qualify as official acts, we cannot accept the assertion that they may never do so. Here, again, the proposed instruction goes too far.

Finally, we hold that the court did not err in refusing to instruct the jury, in language borrowed from *Citizens United v. Federal Election Commission*, 558 U.S. 310, 361 (2010), that "mere ingratiation and access are not corruption." J.A. 753. Affording the talismanic significance Appellant assigns to this language ignores its context; *Citizens United*, a campaign-finance case, involved neither the honest-services statute nor the Hobbs Act. Moreover, the *Citizens United* Court employed the "ingratiation" language only after providing a much broader definition of corruption: "The hallmark of corruption is the financial quid pro quo: dollars for political favors." *Citizens United*, 558 U.S. at 359 (internal quotation marks omitted). In the case at hand, this broader definition was "substantially covered by the court's charge to the jury." *Smith*, 701 F.3d at 1011 (internal quotation marks omitted). Thus, the court's failure to include this language did not "impair[]" Appellant's "ability to conduct his defense." *Id.* (internal quotation marks omitted). The district court instructed the jury that "there would be no

crime" as long as Appellant "believed in good faith that he was acting properly, even if he was mistaken in that belief." J.A. 7692. Appellant was thus free to argue that he believed in good faith that any ingratiation or access he provided Williams was entirely proper. If the jury believed that, it would have had no choice but to acquit him.

Taken as a whole, Appellant's proposed instruction on the meaning of "official act" failed to present the district court with a correct statement of law. He cannot now argue that the court's refusal to give that instruction was an abuse of discretion.

3.

Quid Pro Quo

Appellant also contests the court's instructions on the "quid pro quo" elements of honest-services wire fraud and Hobbs Act extortion, maintaining that the court's gloss on this term would criminalize the lawful receipt of "goodwill" gifts to lawmakers.

In this context, the term "quid pro quo" refers to "an intent on the part of the public official to perform acts on his payor's behalf." *Jefferson*, 674 F.3d at 358; *see also Sun-Diamond*, 526 U.S. at 404-05 (defining "quid pro quo as "a specific intent to give or receive something of value in exchange for an official act" (emphasis omitted)). Accordingly, in its instructions on the honest-services wire fraud charge, the district court explained that the jury must find that Appellant demanded or received the item of value "corruptly"—i.e., with an "improper motive or purpose." J.A. 7669-70; *see United States v. Quinn*, 359 F.3d 666, 674 (4th Cir. 2004) (defining "[c]orrupt intent" under 18 U.S.C. § 201(b)). Likewise, in its

Hobbs Act instruction, the court stated that Appellant must have "obtained a thing of value to which he was not entitled, knowing that the thing of value was given in return for official action." J.A. 7682; *see Evans*, 504 U.S. at 268.

Appellant's contention is not that the court's instructions were incorrect but, rather, that they were incomplete. In particular, Appellant asserts that the court failed to make the jury aware of a critical limitation on bribery liability when it neglected to state, per his proposed instructions, that "[a] gift or payment given with the generalized hope of some unspecified future benefit is not a bribe." J.A. 751; *accord id.* at 756. Appellant claims that this omission seriously impaired his defense because "a central defense theory was that Governor McDonnell believed Williams was simply trying to cultivate goodwill." Appellant's Br. 59-60.

Appellant's statement of the law is correct, so far as it goes. *See United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998). "It is universally recognized that bribery occurs only if the gift is coupled with a particular criminal intent. That intent is not supplied merely by the fact that the gift was motivated by some generalized hope or expectation of ultimate benefit on the part of the donor." *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976) (citations omitted) (reversing a conviction for misapplication of bank funds pursuant to 18 U.S.C. § 656). The bribe payor must have more than a "'[v]ague expectation[]'" that the public official will reward his kindness, somehow or other. *Jennings*, 160 F.3d at 1013 (quoting *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993)). He must

harbor an intent to secure a "specific type of official action or favor in return" for his largesse. *Id.* at 1014 (emphasis omitted).

The Government never disputed these points. Indeed, there is little reason to doubt that if the defense had submitted a written instruction relating to goodwill gifts, the court would have accepted it. However, the defense did no such thing. Instead, its proposed "goodwill gift" language was tucked into the penultimate sentence of the defense's proposed instructions on the definition of "corruptly," *see* J.A. 751, 756, a term the court took care to explicate, *see id.* at 7670 (explaining that bribery requires a corrupt intent—meaning, here, that the public official must demand, seek, or receive the item of value "knowingly and dishonestly for a wrongful purpose"). As outlined above, the court emphasized the essentiality of the prosecution's burden to prove corrupt intent when it instructed the jury on Appellant's "good faith" defense. *See* J.A. 7692 (charging the jury that "if a defendant believed in good faith that he or she was acting properly, even if he or she was mistaken in that belief, and even if others were injured by his or her conduct, there would be no crime"). Appellant was adamant, during the trial conference, about the importance of his "good faith" defense in this case, referring to it as "our critical defense." *Id.* at 7360.

It is not enough, in any event, for Appellant to show that his proposed instructions contained a correct statement of law. If, as it happens, the rejected instruction was "substantially covered by the court's charge to the jury," there is no reversible error. *United States v. Passaro*, 577 F.3d 207, 221 (4th Cir.

2009) (internal quotation marks omitted). Put succinctly, we are satisfied that the court's "quid pro quo" instructions were adequate. In its Hobbs Act instruction, the court made clear that extortion under color of official right requires an intent to have the public official "take *specific* official action on the payor's behalf." J.A. 7682-83 (emphasis supplied). Similarly, in its instruction on honest-services wire fraud, the court referred to the "quo" in a quid pro quo exchange as "the requested official action"—signaling that an official action necessarily entails some particular type of act within the parties' contemplation at the time of the exchange. *Id.* at 7669.

In sum, we are satisfied that the court properly instructed the jury on the "quid pro quo" requirement of the charged offenses. Accordingly, we reject Appellant's claim of instructional error in that respect.

B.

Sufficiency of the Evidence

This leads us to Appellant's claim that the Government's evidence was insufficient to support the convictions. "We review a challenge to the sufficiency of the evidence de novo " *United States v. Bran*, 776 F.3d 276, 279 (4th Cir. 2015). If, viewing the evidence in the light most favorable to the Government, we find there is substantial evidence to support the conviction, we will affirm the jury verdict. *See United States v. Hager*, 721 F.3d 167, 179 (4th Cir. 2013). "Substantial evidence is such evidence that a reasonable finder of fact could accept as adequate and sufficient to support a

conclusion of a defendant's guilt beyond a reasonable doubt." *Id.* (internal quotation marks omitted).

To review, the Government set out to prove that Williams and Appellant engaged in a corrupt quid pro quo. Williams, we know, supplied the "quid," and plenty of it. Among other things, he provided Appellant's family—generally at the behest of Appellant or Mrs. McDonnell—with multiple five-figure payments and loans, expensive getaways, shopping trips, golf outings, and a Rolex watch. The greater challenge for the Government was persuading the jury that Williams's payments to Appellant and his family were "pro quo." In short, the Government was obligated to prove, first, that Williams's payments came with a corrupt understanding and, second, that the key to that understanding was the expectation that Appellant would perform certain official acts for Williams's benefit.

1.

Evidence of Official Acts

In the first place, we reject Appellant's contention that the Government's evidence cannot satisfy the "official act" requirement.

An "official act," as defined by statute, requires the existence of some "question, matter, cause, suit, proceeding or controversy." 18 U.S.C. § 201(a)(3). Here, the Government presented evidence of three questions or matters within Appellant's sphere of influence. The first of these was whether researchers at any of Virginia's state universities would initiate a study of Anatabloc. The second was whether the state-created Tobacco Indemnification and

Community Revitalization Commission ("Tobacco Commission") would allocate grant money for the study of anatabine. The third was whether the health insurance plan for state employees in Virginia would include Anatabloc as a covered drug.

These were all government matters, and Appellant, as head of the Commonwealth's government, was in a prime position to affect their disposition. The Constitution of Virginia vests the Governor with "[t]he chief executive power of the Commonwealth." Va. Const. art. V., § 1. State law provides that the Governor "shall have the authority and responsibility for the formulation and administration of the policies of the executive branch." Va. Code Ann. § 2.2-103.A. These powers include the authority to approve the health insurance plans provided to public-sector employees at the state and local level. *See id.* §§ 2.2-1204.A, -2818.A. In addition, among his myriad other powers, the Governor appoints 12 of the 13 members of the State Council of Higher Education for Virginia, *see id.* § 23-9.3.C.; all members serving on the boards of visitors of Virginia Commonwealth University and the University of Virginia, *see id.* §§ 23-50.6(a), 70.A; and a majority of commissioners on the Tobacco Commission, *see id.* § 3.2-3102.A.

With power comes influence. As the witness Jerry Kilgore, Star's lawyer, put it: "[T]he Governor is the Chief Executive of the Commonwealth. He has this bully pulpit, if you will, to go out and talk about issues." J.A. 4374. The evidence at trial made clear that Star executives wanted Appellant to use his prominence and influence to the company's advantage. *See e.g., id.* at 3898 (former Star President Perito testifying that when "the Chief

Executive of the Commonwealth embraces the worthiness of the product[,] [i]t gives it a type of credibility"); *see also id.* at 2314 (Williams testifying that the opportunity to "showcase" a product at the Governor's Mansion "automatically" imbues the product with "credibility").

To the extent, then, that Appellant made any "decision" or took any "action" on these matters, the federal bribery laws would hold that decision or action to be "official." 18 U.S.C. § 201(a)(3). As we have explained, it was not necessary for the Government to prove that Appellant actually took any such official action. What the Government had to show was that the allegedly corrupt agreement between Appellant and Williams carried with it an expectation that some type of official action would be taken. *See United States v. Giles*, 246 F.3d 966, 973 (7th Cir. 2001). Here, the Government exceeded its burden. It showed that Appellant did, in fact, use the power of his office to influence governmental decisions on each of the three questions and matters discussed above.

First, in August 2011, Appellant asked his Secretary of Health, Dr. Hazel, to send a deputy to a "short briefing" with Mrs. McDonnell at the Governor's mansion. In his email to Hazel, Appellant made clear that the subject of the briefing would be "the Star Scientific anatablock trials planned in va at vcu and uva." G.S.A. 80. Naturally, the staff complied. As one staffer, Molly Huffstetler, wrote in an email to her colleagues: "[W]e will do what we can to carry out the desires of the Governor and First Lady." *Id.* at 81.

That same month, Appellant and his wife hosted a product launch for Anatabloc at the Governor's Mansion. Prior to the event, Mrs. McDonnell explained to a staff member that one of the purposes of the event was to "encourag[e] universities to do research on the product." J.A. 3608. Invitees included Dr. Clore, an associate vice president for clinical research at VCU, and Dr. Lazo, former associate dean for basic research at the UVA School of Medicine. Appellant spoke with Lazo, asking him and other attendees whether they thought "there was some scientific validity" to the pre-clinical studies of Anatabloc presented at the event and "whether or not there was any reason to explore this further; would it help to have additional information." J.A. 3344. Appellant also asked whether the development of Anatabloc could "be something good for the Commonwealth, particularly as it relates to [the] economy or job creation." *Id.*

A series of emails exchanged in February 2012 between Appellant, his wife, and chief counsel Eige shows Appellant continuing to push for state university research on Anatabloc. In a February 17 email, Appellant told Eige: "Pls see me about anatabloc issues at VCU and UVA. Thx." G.S.A. 157. Eige would later express his discomfort with Appellant's involvement in the issue, telling Kilgore: "I've been asked by the Governor to call and put—you know, show support for this research, and I'm just—I just don't think we should be doing it." J.A. 4374 (internal quotation marks omitted).

Just a week before Appellant's email to Eige, Mrs. McDonnell sent a series of emails of her own asking Eige to get in touch with Williams. The first

email bore the subject line: "FW: Anatabine clinical studies—UVA, VCU, JHU." This email said that Williams "has calls in to VCU & UVA & no one will return his calls." G.S.A. 147 The next day, while sitting right next to Appellant, Mrs. McDonnell emailed Eige again:

> Pls call Jonnie today [and] get him to fill u in on where this is at. Gov wants to know why nothing has developed w studies after Jonnie gave $200,000. Gov wants to get this going w VCU MCV Pls let us know what u find out after we return.

Id. at 154. The email included Williams's cell phone number. Eige later testified that he understood the emails to mean that Mrs. McDonnell wanted him to "[s]omehow reach out and see if we couldn't elicit some type of response from these two universities." J.A. 3214.

Appellant argues that these actions—asking a staffer to attend a briefing, questioning a university researcher at a product launch, and directing a policy advisor to "see" him about an issue—are too insignificant to constitute official acts. We disagree. With each of these acts, Appellant exploited the power of his office in furtherance of an ongoing effort to influence the work of state university researchers. Accordingly, a reasonable juror could find, beyond a reasonable doubt, that the actions contemplated under Appellant's agreement with Williams were "official" in nature.

A jury could likewise conclude that Appellant performed an "official" act when he discussed Anatabloc at the March 2012 meeting with two high-

ranking administration officials: Secretary of Administration Hicks-Thomas and Department of Human Resource Management Director Sara Wilson. There, amid a discussion about the state employee health insurance plan, Appellant pulled a bottle of Anatabloc from his pocket and showed the pills to Hicks-Thomas and Wilson. As Hicks-Thomas recalled, Appellant "said that he had been taking [the pills] and that they were working well for him, and that he thought it would be good for state employees." J.A. 4227 Appellant then asked Hicks-Thomas and Wilson if they would be willing to meet with Star. Here, again, the evidence suggests that Appellant used his position as Governor to influence a matter of importance to Virginia. This evidence was more than sufficient to support the jury's verdict.

2.

Evidence of a Quid Pro Quo

Next we turn to whether the Government presented evidence sufficient to support a conclusion that there was a corrupt quid pro quo, "a specific intent to give or receive something of value in exchange for an official act." *Sun-Diamond*, 526 U.S. at 404—05 (emphasis omitted). To establish the necessary intent, the Government had to present evidence of "an exchange of money (or gifts) for specific official action." *Jennings*, 160 F.3d at 1014. Direct proof of a corrupt intent is not necessary, and "[s]uch an intent may be established by circumstantial evidence." *Id.*

At trial, the Government presented an array of evidence to show Appellant's corrupt intent. Critically, the Government's evidence demonstrated a

close relationship between Appellant's official acts and the money, loans, gifts, and favors provided by Williams to Appellant and Mrs. McDonnell. With respect to the official acts alleged by the Government, a "quo" came on the heels of each "quid." For example:

- Between July 28 and July 31, 2011, Williams provided lodging, transportation, and a boat for the McDonnells' Smith Mountain Lake vacation. Upon returning home on July 31—after a three-hour trip home in Williams's Ferrari—Appellant directed Hazel to send a deputy to meet with Mrs. McDonnell about Anatabloc. On August 1, Huffstetler, Williams, and Mrs. McDonnell met at the Governor's Mansion to discuss Anatabloc clinical trials at UVA and VCU.
- Later that month, on August 31, 2011, McDonnell hosted the launch of Anatabloc at the Governor's Mansion. State employees arranged the event, and invitations to the launch bore the Governor's seal. UVA and VCU researchers attended as invited representatives of their institutions, boxes of Anatabloc were placed at each place setting, and Williams and Mrs. McDonnell spoke at the event.
- Between February and March 2012, Appellant and Williams had a series of discussions regarding a $50,000 so-called loan. On February 16, Appellant checked in with Williams about documents relating to the monies. Six minutes later, Appellant emailed

Eige, asking Eige to see him about the Anatabloc studies.

- During these payment negotiations, Mrs. McDonnell and Appellant encouraged Williams to "invite all the doctors that [he] want[ed] to invite" to the healthcare industry leaders reception held at the Governor's Mansion on February 29. J.A. 2312. The list of invitees for the event was revised to include Williams's guests at the direction of Appellant and Mrs. McDonnell.
- On the day of the healthcare leaders event, Appellant met with Williams about a loan of Star Scientific shares worth $187,000. J.A. 6767-72. Less than five hours later, Appellant saw Williams at the event. Appellant's briefing materials for the evening specifically identified the "[p]ersonal doctors of McDonnells," which included Williams's guests, doctors affiliated with Anatabloc. J.A. 6775. Following the event, Williams took Appellant, Mrs. McDonnell, and two of these doctors out to dinner.
- On March 6, 2012, as a result of the negotiations, Williams wrote a $50,000 check to Mobo. Then, on March 21, Appellant met with Hicks-Thomas to discuss covering Anatabloc under the state health plan. Appellant also asked Hicks-Thomas to meet with Star representatives.

The temporal relationship between the "quids" and "quos"—the gifts, payments, loans, and favors and

the official acts constitute compelling evidence of corrupt intent.

Throughout the two years during which Appellant was performing the official acts alleged, Williams lavished Appellant with shopping sprees, money, loans, golf outings, and vacations:

- In April 2011, Mrs. McDonnell contacted Williams about a political rally and shopping in New York. On April 13, Williams spent approximately $20,000 on Mrs. McDonnell's New York City shopping spree. That evening, Williams sat next to Appellant and his wife during the political rally.
- In May 2011, Williams loaned the McDonnells $50,000 and provided $15,000 to cover the McDonnells' daughter's wedding reception. When she requested the loan, Mrs. McDonnell said, "The Governor says it's okay for me to help you and—but I need you to help me." J.A. 2231 (internal quotation marks omitted). In the meantime, Appellant passed an article about Anatabloc along to members of his administration.
- On May 29, 2011, Williams paid $2,380.24 for Appellant and his sons to enjoy golf and amenities at Kinloch Golf Club.
- On January 7, Williams paid $1,368.91 for another of Appellant's golf outings.
- During the 2012 Memorial Day weekend, Williams footed the bill for the McDonnells' vacation, spending more than $7,300.

None of these payments were goodwill gifts from one friend to another. Indeed, Appellant and Williams did not know each other until after Appellant was elected Governor. As Williams testified with regard to the money he provided, "I was loaning [Appellant] money so that he would help our company." *Id.* at 2360. He expected Appellant "to help me move this product forward in Virginia" by "assisting with the universities, with the testing, or help with government employees, or publicly supporting the product." *Id.* at 2355. And since at least their shared cross-country flight in October 2010, Appellant knew what Williams wanted for his company: independent studies of Anatabloc conducted by Virginia universities.

This evidence established that Appellant received money, loans, favors, and gifts from Williams in exchange for official acts to help Williams secure independent testing of Anatabloc. In light of the foregoing, the jury could readily infer that there were multiple quid pro quo payments, and that Appellant acted in the absence of good faith and with the necessary corrupt intent. *See United States v. Hamilton*, 701 F.3d 404, 409 (4th Cir. 2012) ("[I]ntent can be implied—and it is the jury's role to make such factual inferences.").[23]

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[23] Significantly, the jury found the necessary corrupt intent despite being instructed extensively on Appellant's "good faith" defense and hearing from an array of witnesses who testified to Appellant's honesty, integrity, respect for the law, and good character. The jury was instructed not only that "if a defendant believed in good faith that he or she was acting properly there would be no crime," but also that "evidence of good character alone may create a reasonable doubt as to a

In sum, Appellant has thereby failed to sustain his heavy burden of showing that the Government's evidence was inadequate. *See United States v. Engle*, 676 F.3d 405, 419 (4th Cir. 2012) ("A defendant bringing a sufficiency challenge must overcome a heavy burden, and reversal for insufficiency must be confined to cases where the prosecution's failure is clear." (citations omitted) (internal quotation marks omitted)). Accordingly, the trial evidence was sufficient to support each of Appellant's convictions.

IV.

Appellant received a fair trial and was duly convicted by a jury of his fellow Virginians. We have no cause to undo what has been done. The judgment of the district court is

AFFIRMED

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defendant's guilt." *See* J.A. 7692, 7694. Appellant's character witnesses included cabinet members from his time as Governor of Virginia, as well as longtime friends such as Father Timothy R. Scully, a Catholic priest and University of Notre Dame professor who met Appellant in 1972 when they became college roommates.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA, v. ROBERT F. MCDONNELL, and MAUREEN G. MCDONNELL, Defendants.	Action No. 3:14-CR-12

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant Robert F. McDonnell's Motion #40 ("Motion") (ECF No. 511). The Government filed an Opposition Memorandum ("Opp'n Mem.") (ECF No. 530) on October 14, 2014. McDonnell subsequently filed a reply on October 24, 2014 ("Reply Mem.") (ECF No. 541). The parties have not requested a hearing on this matter, and the Court finds that oral argument is unnecessary. E.D. Va. Loc. Crim. R. 47(J). For the reasons set forth below, the Motion is hereby DENIED.

I. BACKGROUND

Defendant Robert F. McDonnell ("McDonnell") served as the 71st Governor of the Commonwealth of Virginia from January 2010 to January 2014. His wife, Maureen G. McDonnell ("Mrs. McDonnell"), served as the First Lady of Virginia.

During his campaign for Governor, McDonnell met Jonnie Williams ("Williams"). Williams was the Chief Executive Officer of Star Scientific, Inc. ("Star Scientific"). Beginning in or about 2007, Star Scientific focused on utilizing certain alkaloids in the tobacco plant, namely anatabine, to address issues related to the desire to smoke. The company engaged in the development, manufacture, and marketing of two anatabine-based dietary supplements: CigRx and Anatabloc. To gain customer and physician approval of its products, Star Scientific sought scientific studies of anatabine.

On January 21, 2014, McDonnell, along with his wife, was charged in a 14-count indictment, with Counts 1-11 alleging that he committed and conspired to commit honest-services wire fraud and extortion under color of official right. Specifically, the indictment alleged that "the defendants participated in a scheme to use ROBERT MCDONNELL's official position as the Governor of Virginia to enrich the defendants and their family members by soliciting and obtaining payments, loans, gifts, and other things of value from [Williams] in exchange for ROBERT MCDONNELL performing official actions on an as-needed basis, as opportunities arose, to legitimize, promote, and obtain research studies for Star Scientific's products, including Anatabloc." Indictment ¶ 22. On

September 4, 2014, a jury convicted McDonnell on Counts 1 11.

On September 18, 2014, McDonnell filed the instant Motion, asking the Court to vacate the jury's "flawed" verdict and grant a new trial based on the following four reasons: (1) the Court's jury instructions were legally erroneous because they (i) allowed the jury to convict McDonnell on an erroneous understanding of "official act," and (ii) allowed a conviction on the theory that McDonnell accepted things of value that were given for future unspecified action; (2) McDonnell was deprived of his right to an impartial jury due to an inadequate inquiry into each prospective juror's exposure to the "near constant, overwhelmingly prejudicial publicity" before the trial; (3) the Court's failure to voir dire the jurors based on evidence of juror misconduct; and (4) the Court erroneously admitted highly prejudicial Rule 404(b) evidence that McDonnell received things of value from William Goodwin and that McDonnell's staff organized free golf for him.

II. LEGAL STANDARD

Under Federal Rule of Criminal Procedure 33, "the [district] court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P 33(a). A motion for a new trial brought on the basis of any ground besides newly discovered evidence "must be filed within 14 days after the verdict or finding of guilty." Fed. R. Crim. P 33(b)(1)—(2).

Whether to award a new trial is within the district court's broad discretion. *See United States v. Smith*, 451 F.3d 209, 216-17 (4th Cir. 2006). The discretion

to award a new trial, however, should be used sparingly, and "only when the evidence weighs heavily against the verdict." *United States v. Perry*, 335 F.3d 316, 320 (4th Cir. 2003) (citations and internal quotation marks omitted).

III. DISCUSSION

A. Claim 1: The Court's Jury Instructions Were Legally Erroneous

Based on *United States v. Jennings*, 160 F.3d 1006 (4th Cir. 1998), McDonnell harps on the argument that "vague expectations of some future benefit" are not "sufficient to make a payment a bribe." He claims that upholding his conviction based on the Government's overbroad interpretation of "official act" would set a precedent of criminalizing routine political courtesies. McDonnell's contentions, however, miss the mark.

(1) *Erroneous Understanding of "Official Act"*

McDonnell first argues that the Court's jury instructions turned established legal principles "on their head" by allowing the jury to convict McDonnell on an erroneous understanding of "official act."

The Hobbs Act, 18 U.S.C. § 1951, criminalizes extortion, or the obtaining of property from another, with the official's consent, under color of official right. 18 U.S.C. § 1951(b)(2). At common law a public official committed extortion when he took "by color of his office" money that was not due to him for the performance of his official duties. *Evans v. United States*, 504 U.S. 255, 260 (1992). The portion of the present-day Hobbs Act that refers to official misconduct continues to mirror this common-law definition. *Id.* at 264. Thus, to prosecute a violation

of the Hobbs Act, "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.* at 268 (emphasis added).

Similarly,"[t]he intangible right of honest services refers to the public's right to a government official's honest, faithful, and disinterested services." *United States v. Harvey*, 532 F.3d 326, 333 (4th Cir. 2008) (quoting *United States v. Mandel*, 591 F.2d 1347, 1362 (4th Cir. 1979)) (internal quotation marks omitted). As such, acceptance of a bribe, or the exchange of a thing or things of value for official action by a public *official*[1], constitutes a violation of this public right. *Id.*

This case hinges on the interpretation of an "official act" and whether McDonnell's actions constitute such. At its most basic definition, an "'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3). More specifically, official action is conduct that is taken "as part of a public official's position"—whether pursuant to an explicit duty or as a matter of "clearly established settled practice." *United States v. Jefferson*, 674 F.3d 332, 353 (4th Cir. 2012). Obviously, however, McDonnell challenges the finer aspects of this elementary definition.

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[1] Tr. Vol. XXVI 6100:9-11.

Clearly the bribery statute does not encompass every action taken in one's official capacity, *see id.* at 356, or else absurd outcomes would assuredly result. But, on the other hand, "[e]very action that is within the range of official duty comes within the purview of [this statute]." *United States v. Birdsall*, 233 U.S. 223 (1914). Thus, to distinguish between the apparent fine line of routine official duties and public corruption, the Court must look to whether a quid pro quo agreement existed.

A quid pro quo agreement evinces a sort of "I'll scratch your back if you scratch mine" arrangement. *Jennings*, 160 F.3d at 1014. In other words, "[b]ribery requires the intent to effect an exchange of money (or gifts) for specific action (or inaction), but each payment need not be correlated with a specific official act." *Id.* "The quid pro quo requirement is satisfied so long as the evidence shows a course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor.' Thus, all that must be shown is that payments were made with the intent of securing a specific type of official action or favor in return." *Id.* (citation and internal quotation marks omitted).

Admittedly, mere "[i]ngratiation and access" may not alone create a quid pro quo agreement within the meaning of the bribery statutes. *See Citizens United*, 558 U.S. 310, 360 (2010). As Judge Merritt recently observed,

> Subjective intent is the keystone of bribery. The influence of money in politics is growing by leaps and bounds, and the subjective intent of the public official receiving the money is perhaps the last and only distinguishable

> feature between criminal "quid pro quo bribery" and permissible "ingratiation." The exchange of money for a vote is a crime that threatens the foundation of democracy. *Buckley v. Valeo*, 424 U.S. 1, 26-27, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). The exchange of money for "ingratiation and access is not corruption" at all; indeed, the exchange is so essential to the foundation of democracy that it is protected by the First Amendment. *McCutcheon v. FEC*, —U.S.—, 134 S.Ct. 1434, 1441, 188 L.Ed.2d 478 (2014) (internal edits omitted). We are left to distinguish the two as best we can by looking into the subjective intent of the public official. And by we, I mean the jury.

United States v. Dimora, 750 F.3d 619, 632 (6th Cir. 2014) (Merritt, J., dissenting). Thus, to distinguish between mere access and federal corruption, the Court should look to McDonnell's subjective intent in receiving the money.

The Government provided substantial evidence for the jury to conclude that McDonnell knew what Williams was seeking, specifically, research studies for Star Scientific's Anatabloc product. Through Williams' direct examination, the Government elicited testimony that in October of 2010, McDonnell flew back from California to Virginia on Williams' private jet. Tr. Vol. III 658:18-20. On that flight Williams explained to McDonnell that he "needed testing and [he] wanted to have this done in Virginia." *Id.* at 660:7-8. Williams testified that he asked McDonnell if McDonnell "[w]ould connect [him] with the person in Virginia in [McDonnell's] administration so that [he could] move this forward."

Id. at 660:9-11. Moreover, and most tellingly, in June 2011, Williams sent a letter to McDonnell that specifically described the context within which Williams sought official action from McDonnell. Tr. Vol. IV 701-705; Gov't Ex. 162. And McDonnell admitted on cross-examination that he received the letter, Tr. Vol. XXI 5036:10, and at least read the portion of the letter suggesting that McDonnell initiate a "Virginia study" of Anatabloc at UVA and the Medical College of Virginia ("MCV"), *id.* at 5037:3-11. Thus, based on the evidence presented, the jury could have properly determined that in accepting Williams' gifts and loans, McDonnell understood the implicit quid pro quo.

The next logical question the Court must now address is whether the Government provided sufficient evidence of the "quo," that is the "official action," in this case. McDonnell argues that the Government invited the jury to find that he had performed official acts merely by acting in his official capacity, so long as there was some connection to "Virginia business development." (Mem. in Supp. of Mot. at 4.) But contrary to McDonnell's argument, the Government did not rely on vague, broadly defined actions or matters. The Government instead pointed to five specific actions taken by McDonnell "to legitimize, promote, and obtain research studies for Star Scientific products."

One such example is the meeting between McDonnell, Lisa Hicks-Thomas ("Hicks-Thomas"), McDonnell's Secretary of Administration, and Sarah Wilson ("Wilson"), the Virginia Department of Human Resource Management Director. In that meeting, McDonnell pulled out a bottle of Anatabloc

and said that he had been taking the pills and "they were working well for him, and [] he thought it would be good for [] state employees." Tr. Vol. XI 2676:15-19. Hicks-Thomas testified that *McDonnell then asked if she and Wilson would "meet with the people."* *Id.* at 2676:19-20 (emphasis added). After the meeting, both women then went down to Hicks-Thomas' office and looked up Anatabloc on the computer. *Id.* at 2677:1-5. Or, for another example, the email to Jason Eige ("Eige"), the Governor's counsel and policy advisor, in which McDonnell said, "Please see me about Anatabloc issues at VCU and UVA." Tr. Vol. VII 1666:9-10. Eige subsequently responded, "Will do. We need to be careful with this issue." *Id.* at 1666:12. In each example, McDonnell attempted to use his gubernatorial position to influence governmental decisions, specifically attempting to obtain research studies for Star Scientific. McDonnell clearly had influential power over Hicks-Thomas, for example, as she testified that she reported to the Governor and he had the power to fire her. Tr. Vol. XI 2673:14-15, 19-20; *see United States v. Carson*, 464 F.2d 424, 433 (2d Cir. 1972) ("There is no doubt that federal bribery statutes have been construed to cover any situation in which the advice or recommendation of a Government employee would be influential ").

These actions were within the range of actions on questions, matters, or causes pending before McDonnell as Governor as multiple witnesses testified that Virginia business and economic development was a top priority in McDonnell's administration. Tr. Vol. IX 2037:17-23; 2234:22-25. His campaign slogan was "Bob's for Jobs." *Id.* at

2232:17-19. And several former McDonnell staffers testified about the various ways that McDonnell would customarily take action on questions, matters and causes of Virginia business and economic development, including hosting events and having meetings. *See id.* at 2235:14-16; Tr. Vol. XI 2545:14-16.

The alleged exchange in this case was not simply receiving things of value in return for official action in the abstract; McDonnell fails to account for the permissible inferences the jury may have drawn with regards to the timing of Williams' gifts and McDonnell's official actions. Moreover, the Court's instructions explicitly required the jury to find a quid pro quo agreement. Tr. XXVI 6100:9-13 ("Bribery involves the exchange of a thing or things of value for official action by a public official. In other words, a quid pro quo. You've heard that phrase, the Latin phrase, meaning 'this for that' or 'these for those.'") The Court specified that the indictment alleged that the McDonnells accepted things of value from Williams "in exchange for Robert McDonnell and the Office of the Governor of Virginia performing official actions on an as-needed basis as opportunities arose to legitimize, promote, and obtain research studies for Star Scientific products." *Id.* at 6089:18-22. These instructions cemented the view that an "official act" is not simply any action related to a broadly defined matter that was taken in McDonnell's official capacity—rather, it was an action taken specifically with respect to Star Scientific.

McDonnell attempts to analogize his case with *United States v. Sun-Diamond Growers of Calif.*, 526 U.S. 398 (1999). In that case, the Supreme Court

discussed the illegal gratuity statute, 18 U.S.C. § 201, and differentiated between an illegal gratuity and a bribe, with the latter requiring proof of a quid pro quo. In its opinion, the Supreme Court noted that to give effect to the statute's language "some particular official act [must] be identified and proved." *Id.* at 406. If an alternative reading was allowed, the Supreme Court noted that actions such as a high school principal's gift of a school baseball cap to the Secretary of Education on the occasion of the latter's visit to the school, or a group of farmers' complimentary lunch for the Secretary of Agriculture in conjunction with his speech to the farmers would be criminalized. *Id.* at 407 The Court admitted that while these actions are assuredly "official acts" in some sense, they are not "official acts" within the meaning of the statute. *Id.* The Supreme Court refused to read the illegal gratuity statute as a "prohibition of gifts by reason of the donee's office." *Id.* at 408. The Court ultimately held that the Government needed to "prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *Id.* at 414.

As an initial matter, the Supreme Court in *Sun-Diamond* did not rule on what constitutes an official act; the Court instead "simply embraced a narrow reading of the illegal gratuity statute." *Jefferson*, 674 F.3d at 355. However, that being said, here the evidence presented by the Government did not simply show that Williams gave gifts and loans to McDonnell by reason of McDonnell's gubernatorial position. Rather, the jury permissibly reasoned that Williams' gifts were tied to the five identified "official

acts" and thus fulfilled the requisite quid pro quo agreement.

McDonnell next challenges two specific lines of the Court's jury instructions, but as explained below, both of McDonnell's arguments are equally unavailing.

(i) *Settled Practice Instruction*

In its instructions to the jury, this Court first defined the definition of "official act" as spelled out under 18 U.S.C. § 201(a)(3). The Court then continued:

> Official action as I just defined it includes those actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law. In other words, official actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description.

Tr. Vol. XXVI at 6102:23-6103:5. McDonnell objects to this instruction, arguing that although an official act may include actions established by settled practice, "the bare fact that an action is a settled practice does not make it an official act." (Mem. in Supp. of Mot. at 6.) McDonnell contends that this "unwieldy language" would inevitably lead the jury to erroneously conclude that an official act is any settled practice of an official.

However, McDonnell fails to align his argument with controlling Fourth Circuit precedent. In *Jefferson*, the district court had delivered a nearly identical instruction. 674 F.3d 332. In explaining

§ 201(a)(3)'s statutory definition of an "official act," the Court charged the jury that "[a]n act may be official even if it was not taken pursuant to responsibilities explicitly assigned by law. Rather, official acts include those activities that have been clearly established by settled practice as part [of] a public official's position." *Id.* at 353. *Jefferson* appealed his conviction, arguing, inter alia, that the district court's "official act" bribery instruction was fatally erroneous. *Id.* The Fourth Circuit rejected *Jefferson*'s challenge to the district court's instructions. The Court refused to exclude from the bribery statute's definition of an official act settled practices by a public official. *Id.* at 356.

In comparing this Court's instruction with that presented in *Jefferson*, the given instruction was appropriate. McDonnell argues, without citation, that the instruction elides the critical distinction between settled practices that are official acts and those that are not. However, McDonnell fails to consider the entirety of the instruction given. *See United States v. Rahman*, 83 F.3d 89, 92 (4th Cir. 1996). The jury was not authorized to ignore the directive that an "official action" must still pertain to a pending question, matter or cause that was before McDonnell. "In other words, the jury could not rely exclusively on [McDonnell's] settled practices." *Jefferson*, 674 F.3d at 357 Viewed in this context, this Court, like the Fourth Circuit in *Jefferson*, holds that "the 'settled practice' instruction did not impermissibly expand the term 'official act.'" *Id.* at 358.

(ii) *Series of Steps Instruction*

The Court's charge to the jury also included the following instruction: "[O]fficial action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end." Tr. Vol. XXVI 6103:10-14. McDonnell argues that this charge "bears no relation to the actual definition of 'official act.'" (Mem. in Supp. of Mot. at 7). However, again, McDonnell's argument is unsupported by Fourth Circuit precedent.

In *Jefferson*, the district court instructed the jury that "the quid pro quo requirement is satisfied if you find that the government has established beyond a reasonable doubt that the defendant agreed to accept things of value in exchange for performing official acts on an as-needed basis " 674 F.3d at 358. The Court highlighted the fact that it is unnecessary "to link every dollar paid to one of the *Jefferson* family companies to a specific meeting, letter, trip, or other action by *Jefferson* to fulfill his end of a corrupt bargain." *Id.* at 359. Rather, it is enough that the "payor intended for each payment to induce the official to adopt a specific course of action." *Id.* (quoting *United States v. Quinn*, 359 F.3d 666, 673 (4th Cir. 2004)) (internal quotations omitted) (emphasis added). In other words, so long as the government's "evidence shows a course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor," then the quid pro quo requirement is satisfied. *Id.* Here, the Court's instruction merely rephrased *Jefferson*'s teachings that bribery can be accomplished through an ongoing course of conduct.

Id. (quoting *United States v. Ganim*, 510 F.3d 134, 149 (2d Cir. 2007)).

(2) *Promise of Unspecified Future Action*

The Court additionally included an instruction that read:

> Bribery also includes a public official's solicitation or agreement to accept a thing of value in exchange for official action whether or not the payor actually provides the thing of value and whether or not the public official ultimately performs the requested official action or intends to do so. Thus, it is not necessary that the scheme actually succeeded or that any official action was taken by the public official in the course of the scheme. What the government must prove is that the defendant you are considering knowingly devised and participated in a scheme or artifice to defraud the public and the government of their right to a public official's honest services through bribery.

Tr. Vol. XXVI 6100:18-6101:5. McDonnell challenges this instruction as well, arguing that the Court's instructions improperly invited the jury to convict him based on a promise of unspecified future action. He argues that if a corrupt agreement is all that the Government must prove, the jury must also be instructed that, to find such an agreement, it must find that the things of value were given in exchange for some specific official act or course of conduct. In other words, he contends that "the instructions failed to explain that quid pro quo corruption involves the 'intent to induce a specific act.'" (Mem. in Supp. of Mot. at 9.)

McDonnell's argument with respect to this issue revolves around the Fourth Circuit's opinion in *Jennings*. In that case, the Fourth Circuit held that the district court's instruction on the "corrupt intent" element of bribery left out the requirement of intent to engage in a quid pro quo. *Jennings*, 160 F.3d at 1020. "The definition fail[ed] to explain that 'corrupt intent' is the intent to induce a specific act." *Id.* at 1021. In other words, none of the court's instructions "stated that *Jennings* [the bribe-payor] must have given money to Morris [the bribe-payee] in exchange for some specific official act or course of action " *Id.* at 1022. Rather, the district court only "charged that it was sufficient if *Jennings* paid Morris to influence him (Morris) 'in connection with' or 'in reference to' [government business]." *Id.* This instruction, the Fourth Circuit held, could have described a situation that only involved a "vague expectation of some future benefit." *Id.*

First, to address a subsidiary argument, the Supreme Court has stated that "fulfillment of the *quid pro quo* is not an element of [bribery]." *Evans*, 504 U.S. at 268. Rather, "the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts." *Id.* (emphasis added). Furthermore, this agreement need not be express but instead may be established by circumstantial evidence. *Jennings*, 160 F.3d at 1014.

Secondly, and most importantly, quite unlike the jury instruction given in *Jennings* that "left out the quid pro quo requirement," *id.* at 1021, this Court explicitly stated that bribery requires a quid pro quo, meaning "this for that" or "these for these." Tr. Vol.

XXVI 6100:11 13. The given instructions were not "too general," *Jennings*, 160 F.3d at 1022, because they explained that an item of value must be given in exchange for official action. Specifically, that official action was intended to "legitimize, promote, and obtain research studies for Star Scientific's products." Tr. Vol. XXVI at 6089:21-22. Taken as a whole, *see Rahman*, 83 F.3d at 92, the Court's instructions did not advise the jury to convict McDonnell on a promise of unspecified future action. *See Jennings*, 160 F.3d at 1022 ("If any of the court's four explanations of 'corrupt intent' required the jury to find a relatively specific quid pro quo, the jury instruction would have been saved.").

(2) Claim 2: Court's Voir Dire on Pretrial Publicity was Inadequate

McDonnell argues that the voir dire process failed to provide reasonable assurances that bias would be discovered. He contends that the Court's failure to conduct an independent inquiry of each prospective juror to determine what affect the "avalanche" of prejudicial pretrial publicity had on the juror's impartiality necessitates the grant of a new trial. However, in the province of voir dire, the district court holds the reigns.

Jury voir dire is an essential element in guaranteeing a criminal defendant's Sixth Amendment right to an impartial jury. *United States v. Lancaster*, 96 F.3d 734, 738 (4th Cir. 1996). Federal Rule of Criminal Procedure 24 provides the basic procedure for empaneling a jury in a federal criminal trial:

> (1) In General. The court may examine prospective jurors or may permit the attorneys for the parties to do so.
>
> (2) Court Examination. If the court examines the jurors, it must permit the attorneys for the parties to:
>
> (A) ask further questions that the court considers proper; or
>
> (B) submit further questions that the court may ask if it considers them proper.

Fed. R. Crim. P 24(a).

Beyond this rule, the voir dire process is essentially committed to the sound discretion of the district court "because the determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge." *Lancaster*, 96 F.3d at 738 (citations and internal quotation marks omitted); *see also Skilling v. United States*, 561 U.S. 358, 386 (2010) ("When pretrial publicity is at issue, primary reliance on the judgment of the trial court makes [especially] good sense "). The Supreme Court has refrained from dictating the subject matter of voir dire questions in all but the most limited circumstances, including capital cases and cases in which racial issues are inextricably bound up with the conduct of the trial. *Lancast* 96 F.3d at 739; *see also Skilling*, 561 U.S. at 386 ("N hard-and-fast formula dictates the necessary depth or breadth of voir dire."). However, one limitation restrains the district court's discretion—that being the voir dire process must "provide a reasonable assurance that prejudice would

be discovered if present." *Lancaster*, 96 F.3d at 740 (citations and internal quotation marks omitted).

"In an era of rapid and widespread communications," the effect of pretrial publicity on a defendant's right to an impartial jury is a question that will become increasingly prominent. *See United States v. Bakker*, 925 F.2d 728, 734 (4th Cir. 1991). However, courts must be reluctant to instantly equate publicity with prejudice. As the Supreme Court noted, "Prominence does not necessarily produce prejudice, and juror impartiality does not require ignorance." *Skilling*, 561 U.S. at 381 (citing *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)). Thus, we do not require jurors to enter the courtroom totally oblivious to the facts and issues involved in the case, "and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." *Irvin*, 366 U.S. at 722. "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." *Id.* at 723. Rather, all that is required is that a juror can lay aside his initial impression or opinion and render a verdict based on the evidence presented in the courtroom. *Id.* Only in extreme circumstances will prejudice be presumed from the existence of pretrial publicity itself. *Wells v. Murray*, 831 F.2d 468, 472 (4th Cir. 1987).

In order to empanel such an impartial jury, the court should undertake a careful voir dire. *Bakker*, 925 F.2d at 734. This inquiry "typically entails an evaluation of the pre-trial publicity complained of

and its impact, if any, on the jury " *Wells*, 831 F.2d at 472 (citation and internal quotation marks omitted).

McDonnell contends that the Court's error lay in its failure in relying on the juror's own assertion of impartiality, rather than conducting a probing inquiry to permit the court to reach its own conclusion. But McDonnell fails to credit the procedures employed by the Court to protect McDonnell's Sixth Amendment right.

First, the Court issued a 99-item questionnaire to 650 prospective jurors that "helped to identify prospective jurors excusable for cause and served as a springboard for further questions put to the remaining members of the array." *Skilling*, 561 U.S. at 388. Second, during in-court voir dire the Court acknowledged the publicity generated by the case and posed two questions to the panel: (1) "[I]f you have read, heard or seen something in the media, I want you to stand up for me;" and (2) "Based on what you have heard or read or seen relating to this case, if you are, in your mind, able to put aside whatever it is that you've heard, listen to the evidence in this case and be fair to both sides, then I want you to sit down." Tr. Vol. I 140:24-25; 141:5-9. After the entire panel answered in the affirmative to both questions, the Court summoned counsel to the bench. The Court stated it was satisfied with the panel's answers. *Id.* at 141:14. However, McDonnell's counsel noted his concerns about the credibility of the jurors and requested further inquiry. *Id.* at 141:21-23. The Court subsequently brought to the bench each juror that McDonnell's counsel identified as cause for concern and questioned each about his or her opinion

of the case and ability to remain impartial. *See id.* at 145:2-155:12. At the end of this questioning the Court asked McDonnell's counsel if there is "anybody else" he would like to question, and McDonnell's counsel responded "not on publicity." *Id.* at 155:18-19. Thus, the record demonstrates that after its collective questioning, the Court allowed McDonnell to follow-up with individual jurors whom he believed provided less than satisfactory answers. *See Bakker*, 925 F.2d at 734. Therefore, based on the adequacy of the procedures employed, and the Court's overall discretion in managing voir dire, McDonnell's instant claim is unfounded.

(3) Claim 3: Court's Failure to Voir Dire the Jurors Based on Evidence of Juror Misconduct

McDonnell's third claim focuses on the juror, Louis DeNitto ("DeNitto"), who was stricken from the jury on August 12, 2014 on the ground that he had violated the Court's order against discussing the case with anyone. DeNitto had contacted James Watson ("Watson"), an attorney who had previously represented DeNitto in civil matters. DeNitto reportedly told Watson that he was the foreman of the jury and the jurors were "all over the place." After the issue came to light, the Court held an in-chambers conference on August 12, 2014 where both DeNitto and Watson were questioned. When interviewed by the Court, DeNitto denied saying that he was the foreman. Chambers Conf. Tr., August 12, 2014, 13:14-15. With regards to his statement that the jury was "all over the place," DeNitto stated, "What I meant by that was we didn't know, I didn't know where the charges referred to in what we were,

the lawyers and so forth were talking about in the trial [sic]." *Id.* at 13:25-14:3. DeNitto denied that he talked to any of the jurors about the case. *Id.* at 14:12-14. Rather, all DeNitto admitted was that "[d]ifferent comments are made when [the jury] walks back [into the jury room], like 'Wow, glad that's over with,' or that sort of thing " *Id.* at 14:15-16. McDonnell then requested that (1) the entire panel be interviewed *in camera* given the evidence that they have been actively discussing the case, contrary to the Court's order that "[u]ntil you retire to the jury room at the end of the case to deliberate on your verdict, you simply are not to talk about this case," Tr. Vol. II, at 193:2-4; (2) the Court declare a mistrial in light of the same; and (3) the first alternate juror be struck in view of the fact that he had been sleeping through much of the trial, including the cross-examination of Williams. However, the Court denied each of McDonnell's requests.

McDonnell now contends that based on the Court's interviews of Watson and DeNitto, credible evidence existed that the jury had begun deliberating prematurely. He argues that the Court's failure to voir dire the remaining jurors despite this evidence constitutes grounds for a new trial. However, again, the Court possesses generous discretion in handling a claim of juror misconduct.

It is a well-established principal of trial administration that jurors must not engage in discussions of a case prior to the time they retire and begin formal deliberations. *United States v. Resko*, 3 F.3d 684, 688 (3d Cir. 1993). Accordingly, trial judges routinely admonish juries at the outset of trial not to discuss the case with anyone before the

conclusion of trial. *Id.* at 689. In the present case, the Court gave such an instruction: "First, I instruct you that during the trial, you are not to discuss the case with anyone or permit anyone to discuss it with you. Until you retire to the jury room at the end of the case to deliberate on your verdict, you simply are not to talk about this case." Tr. Vol. II 192:25-193:4. However, it is unrealistic to believe that jurors will never comment to each other on any matter related to a trial, especially in a trial spanning a total of more than five weeks. Thus, the Court must address the issue when, such as here, jurors allegedly fail to follow the Court's explicit order.

Courts have distinguished between external jury influences and "intra-jury" communications. *Wolfe v. Johnson*, 565 F.3d 140, 161 (4th Cir. 2009). External influences, such as the media and pre-trial publicity, pose a far more serious threat to the defendant's Sixth Amendment right to an impartial jury "because the extraneous information completely evades the safeguards of the judicial process." *Resko*, 3 F.3d at 690. In contrast, when there are intra-jury communications, such as premature jury deliberations, "the proper process for jury decision making has been violated, but there is no reason to doubt that the jury based its ultimate decision only on evidence formally presented at trial." *Id.* Thus, "[a]lthough external jury influences necessitate a thorough judicial inquiry, no such obligation is imposed with regard to an internal jury influence." *Wolfe*, 565 at 161.

Ultimately, like the voir dire process described above, the Court is given ample discretion in dealing with situations of jury misconduct. *Resko*, 3 F.3d at

690; *see also United States v. Diaz*, 597 F.3d 56, 62 (1st Cir. 2010) (citations omitted) ("Indeed, we have held that the court's discretion is 'at its broadest' when it responds to an allegation of premature jury deliberations."). The trial court is in a superior position to observe the jury's demeanor and the impact of any alleged premature deliberations. *Resko*, 3 F.3d at 690. Obviously, however, the Court must exercise caution and careful consideration when allegations of jury misconduct are brought to the Court's attention. *See United States v. Gianakos*, 415 F.3d 912, 921 (8th Cir. 2005).

The First Circuit has developed a multi-step framework for assessing juror misconduct, including premature deliberations: (1) ascertain whether the allegation is colorable; (2) if it is, investigate the extent of any prejudice caused and consider prophylactic measures to alleviate that prejudice; and (3) if no curative measures are adequate, the court may grant a mistrial. *Diaz*, 597 F.3d at 62-63. Following the First Circuit's structure, our analysis need not go any further than the first step.

Based on the Court's face-to-face examination of both DeNitto and Watson, the Court was entitled to exercise its discretion and assess the situation presented. DeNitto's alleged statement that the jurors were "all over the place" did not provide sufficient indicia of premature deliberations. "Conversations between jurors concerning the case they are hearing do not always amount to premature deliberations." *Id.* at 63; *see also United States v. Peterson*, 385 F.3d 127, 135 (2d Cir. 2004) ("Not every comment a juror may make to another juror about the case is a discussion about a defendant's guilt or

innocence that comes within a common sense definition of deliberation."). The Court, however, still struck DeNitto for violating the Court's Order. After dismissing him, the Court again admonished the entire jury not to talk about the case, not "between yourselves as well as outsiders." Tr. Vol. XII 3076:18-25. There was no further evidence that the remaining jurors failed to abide by the Court's admonition.

McDonnell relies on the Third Circuit's rationale in *Resko* to support his argument regarding his third claim. In *Resko*, on the seventh day of a nine-day trial, a juror approached a court officer and told him that the members of the jury had been discussing the case during their recesses and while waiting in the jury room, in disregard of the court's admonition. 3 F.3d at 687. The court responded by distributing a two-part questionnaire, which asked: (1) whether the jurors had discussed the case with other jurors, and (2) if so, whether those discussions had led them to form an opinion as the guilt or innocence of the defendants. *Id.* at 688. Each of the twelve jurors answered "yes" to the first question and "no" to the latter. *Id.* Based on this questionnaire, the district court denied defendants' requests for individualized voir dire and denied their motions for a mistrial. *Id.* The Third Circuit ultimately held that the district court erred by refusing to conduct a "more searching inquiry into the potential prejudice." *Id.* at 686.

While McDonnell correctly alleges all of the above-stated facts from *Resko*, McDonnell fails to ascertain the relevant argument that distinguishes that case from the present one. In *Resko*, the Third Circuit concentrated on the "dearth of information" provided

by the questionnaires and the consequent inability of the district court to assess the nature and extent of the jurors' premature discussions. *See id.* at 690-91. In other words, "the questionnaire raised more questions than it answered." *Id.* at 690. "[T]he very crux of the problem [] is that neither we [the Third Circuit] nor the district court know anything about the nature of the jurors' discussions." *Id.* at 691.

Unlike the situation in *Resko*, in the present case the Court "had enough information [based on the interviews of both Watson and DeNitto] to make a reasoned determination that [McDonnell] would suffer no prejudice due to the jury misconduct." *Id.* *Resko* explicitly admits that in situations where the jury engaged in premature deliberations and the court refused counsel's request for individualized voir dire, but the court had knowledge of the substance of the premature communications, other federal courts of appeals have upheld criminal convictions. *Id.* at 693. This is the exact situation in the present case. Therefore, McDonnell's argument must be rejected.

(4) Claim 4: The Court Erroneously Admitted Prejudicial Rule 404(b) Evidence

Finally, McDonnell argues that the Government was allowed to impugn his character in violation of Rule 404(b) on at least two significant occasions, thereby causing substantial prejudice to the defense. However, this final argument suffers the same fate as the rest.

Although "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity

therewith," such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. " Fed. R. Evid. 404(b). "Because the rule recognizes the admissibility of prior crimes, wrongs, or acts, with only the one stated exception, it is understood to be a rule of inclusion " *United States v. Queen*, 132 F.3d 991, 994 (4th Cir. 1997) (citations omitted).

The principal danger Rule 404(b) seeks to avoid is the fear that defendants will be convicted simply for possessing bad character. *Id.* at 995. However, the Rule "also recognizes that '[e]xtrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.'" *Id.* at 996 (quoting *Huddleston v. United States*, 485 U.S. 681, 685 (1988)).

In *Queen*, the Fourth Circuit spelled out specific findings the Court should make in order to determine that evidence should be admitted under 404(b):

> (1) The evidence must be relevant to an issue, such as an element of an offense, and must not be offered to establish the general character of the defendant. In this regard, the more similar the prior act is (in terms of physical similarity or mental state) to the act being proved, the more relevant it becomes. (2) The act must be necessary in the sense that it is probative of an

> essential claim or an element of the offense.[2] (3) The evidence must be reliable. And (4) the evidence's probative value must not be substantially outweighed by confusion or unfair prejudice in the sense that it tends to subordinate reason to emotion in the fact finding process.[3]

132 F.3d at 997

(1) Goodwin Evidence

First, McDonnell contends that the Court erroneously admitted evidence that he received things of value from William Goodwin ("Goodwin"). Specifically, the Government introduced evidence that McDonnell's draft 2012 Statement of Economic Interest ("SOEI") listed a Kiawah Island trip from Goodwin with a value of $23,312.55. *See* Tr. Vol. XXII 5295:9-5296:7 However, McDonnell subsequently crossed out the trip and wrote "personal," *Id.* at 5296:10-13, and thus McDonnell's final SOEI contained no reference to the Kiawah Island trip, *id.* at 5296:20-24. However, the SOEI still contained other gifts from Goodwin, including a Keswick Cabinet Retreat valued at $920. *Id.* at

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[2] The Court defines evidence as "necessary where, considered in the light of other evidence available to the government, it is an essential part of the crimes on trial, or where it furnishes part of the context of the crime." *Queen*, 132 F.3d at 998 (internal citations and quotation marks omitted).

[3] The court also points to "(1) a limiting jury instruction, when requested by a party, explaining the purpose for admitting evidence of prior acts, and (2) the requirement in a criminal case of advance notice, when so requested, of the intent to introduce prior act evidence" as protections against potential "pit falls" under this Rule. *Queen*, 132 F.3d at 997.

5296:17-19. McDonnell argues that the Government never established that this evidence was relevant to an issue other than character. In essence, he argues, all the evidence did was to suggest that he had a propensity to accept expensive gifts from donors. (Mem. in Supp. of Mot. at 27.)

Under Virginia law, certain state officials, including the Governor, are required to annually file a standardized disclosure of their personal economic interests, commonly referred to as the SOEI. The SOEI requires a state official to disclose, inter alia, gifts or entertainment valued in excess of fifty dollars received by the state official from any business or individual other than a relative or close personal friend. The Government introduced the Goodwin evidence at trial in order to prove McDonnell's prior improper manipulation of this "personal friend" exception because although McDonnell testified that Goodwin was supposedly his personal friend, *id.* at 5051:21-22, the Government produced sufficient evidence for a reasonable jury to reject that testimony. *See id.* at 5051:23-5055:20.

Contrary to McDonnell's argument that this evidence did no more than suggest to the jury that McDonnell had a propensity to accept expensive gifts from donors, the Goodwin evidence was clearly relevant to issues other than McDonnell's general character. First, the evidence showed McDonnell's knowledge of the SOEI and the existence of the "personal friend" exception. Second, McDonnell testified that, like Goodwin, he viewed Williams as a personal friend in 2012, *see* Tr. Vol. XXI 5109:9-14, but despite this opinion of their relationship, he still chose to disclose gifts from Williams on his 2012

SOEI. Thus, this evidence indicated an absence of mistake or accident in omitting the gifts and loans from Williams and thus was relevant to McDonnell's intent to defraud.

Applying the factors defined in *Queen*, evidence of McDonnell's knowledge and of the absence of mistake is relevant to, and probative of, his alleged intent to defraud—an element of the charged crimes; the prior act alleged is similar to the act the Government sought to prove—omission of gifts from Williams pursuant to the personal friend exception; and there is nothing in the record to suggest that the evidence was unreliable or unfairly prejudicial to McDonnell. *See Queen*, 132 F.3d at 997. Therefore, the Goodwin evidence was properly admitted.

(2) *Zubowsky Email*

Secondly, McDonnell argues that the Court erroneously admitted evidence indicating that his staff organized free golf for him. This piece of evidence revolved around a January 2013 email exchange between Emily Rabbit ("Rabbit"), McDonnell's scheduler at the time, and Adam Zubowsky ("Zubowsky"). Gov't Ex. 627 Rabbit asked Zubowsky whether he had any background in planning a golf trip for the Governor and his sons. Tr. Vol. XXI 5137:23-5138:3. Zubowsky responded that Rabbit should find a golf course that will host McDonnell and his family for free. *Id.* at 5138:14-16. Zubowsky then directed Rabbit to put all the information in a briefing book for McDonnell's review. *Id.* at 5138:21-5139:1.

McDonnell now objects to the introduction of this email, arguing that it is both inadmissible hearsay

and Rule 404(b) evidence. As an initial matter, when the Government first attempted to introduce this email through its direct examination of Rabbit, McDonnell's counsel objected on the basis that the evidence is not relevant and "extraordinarily prejudicial." Tr. Vol. XII 2869:1-2. When the Government subsequently attempted to introduce the email during the cross-examination of McDonnell, his counsel again objected solely based on relevancy. Tr. Vol. XXI 5137:7-9. Thus, during trial McDonnell's counsel never objected based on hearsay or Rule 404(b). Based on Federal Rule of Evidence 103, a party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and if the party both timely objected at trial and *stated the specific grounds for the objection*. Fed. R. Evid. 103(a)(1). Because McDonnell's counsel objected solely on the basis of relevance, this Court properly admitted the email at trial. Despite McDonnell's apparent mistake, the Court may still consider McDonnell's present objections if the introduction of this email constituted plain error, meaning it affected McDonnell's substantial rights. Fed. R. Crim. P 52(b); Fed. R. Evid. 103(e).

To proceed with the merits, McDonnell first argues that this email was inadmissible hearsay, and should have been excluded as such. Hearsay is an out-of-court statement that is offered in court to prove the truth of the matter asserted, Fed. R. Evid. 801(c), and is inadmissible at trial unless an exception applies, Fed. R. Evid. 802. A statement that is offered against an opposing party and was made by either the party in his individual capacity or representative capacity, or made by the party's agent or employee on

a matter within the scope of that relationship and while it existed, is deemed non-hearsay. Fed. R. Evid. 801(d)(2)(A), (D).

First, the portion of the email from Rabbit is not hearsay. *See* Fed. R. Evid. 801(d)(2)(D). Rabbit was McDonnell's scheduler at the time and thus an employee. The statement she made in the email was within the scope of her employment relationship, as McDonnell requested that they meet to discuss golf trips in Myrtle Beach or Florida. The statement was then offered against McDonnell at trial.

Second, with respect to Zubowsky's statements in the email, McDonnell's counsel is correct that the email is hearsay that does not fall within any exception. Zubowsky was no longer employed by McDonnell at the time he sent the email and he does not purport to relate any statement made by McDonnell. However, the admission of this evidence was harmless error as it did not affect any substantial right of McDonnell and thus McDonnell's argument must be disregarded. *See* Fed. R. Crim. P 52(a). "Where non-constitutional error is involved, the proper test of harmlessness is whether, on appellate review, this Court can say 'with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by error.'" *United States v. Hartgrove*, No. 90-5331, 919 F.2d 139, at *2 (4th Cir. Nov. 29, 1990) (quoting *United States v. Urbanik*, 801 F.2d 692, 698 (4th Cir. 1986)). Based on the considerable amount of evidence introduced over a five-week period during this trial, the Court can assuredly state that the jury's verdict was not swayed by one portion of one e-mail.

McDonnell next contends that this evidence also violated Rule 404(b) as the Government's only purpose in introducing it was to show McDonnell's character in an unflattering light—that he had a propensity to seek out free expensive gifts. On the other hand, the Government contends that this email "was not Rule 404(b) evidence; [rather] it was offered to rebut Mr. McDonnell's assertion that he didn't seek gifts and he simply accepted gifts to spend time with his family." (Opp'n Mem. at 29.) As support, the Government cites a section of "McCormick on Evidence," which describes impeachment by "specific contradiction." 1 McCormick on Evid. § 45 (7th ed. 2013).

"Impeachment by contradiction is a means of policing the defendant's obligation to speak the truth in response to proper questions." *United States v. Gilmore*, 553 F.3d 266, 271 (3d Cir. 2009) (internal quotation marks and citations omitted). Specifically, "this doctrine provides that when a witness puts certain facts at issue in his testimony, the government may seek to rebut those facts, including by resorting to extrinsic evidence if necessary." *United States v. Ramirez*, 609 F.3d 495, 499 (2d Cir. 2010). In sum, this form of impeachment is intended to prevent the defendant from invoking "the Federal Rules of Evidence in order to shield his perjury from contradiction." *Id.* Impeachment by contradiction is authorized by Federal Rule of Evidence 607 and its application is governed by Rule 403. *Gilmore*, 553 F.3d at 271, *see also United States v. Perez-Perez*, 72 F.3d 224, 227 (1st Cir. 1995) (finding that impeachment by contradiction is not governed by Rule 608(b), but by common-law principles). Most

importantly, this form of impeachment is used to contradict a specific fact the defendant testified to on direct. *See Ramirez*, 609 F.3d at 499; *Gilmore*, 553 F.3d at 271, *United States v. Scott*, 693 F.3d 715, 722 (6th Cir. 2012).

The Government attempts to argue that the introduction of the Zubowsky email was intended to rebut McDonnell's testimony on direct that the "most important gift" he received as governor was "having some time with his family." Tr. Vol. XX 4853:22-25. However, it was not until cross-examination when the Government specifically questioned McDonnell regarding his solicitation of free golf outings. Thus, the Government cannot rest its argument of impeachment by contradiction on the general "notion" implicit in McDonnell's direct testimony.

If the Government's argument is rejected, then the Court must analyze the Zubowsky email pursuant to Rule 404(b). According to the factors defined in *Queen*, this evidence was relevant to McDonnell's motive for entering a corrupt agreement with Williams; the prior act alleged is similar to the act the Government sought to prove—acceptance of free gifts from Williams; and there is nothing in the record to suggest that the evidence was unreliable or unfairly prejudicial to McDonnell. *See Queen*, 132 F.3d at 997. Therefore, the Zubowsky email was also properly admitted.

//

//

IV CONCLUSION

For the foregoing reasons, McDonnell's Motion is DENIED.

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record.

An appropriate Order will issue.

/s/
James R. Spencer
Senior U. S. District Judge

ENTERED this 1st day of December 2014.

APPENDIX C

Filed: August 20, 2015

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-4019
(3:14-cr-00012-JRS-1)

UNITED STATES OF AMERICA

Plaintiff Appellee

v.

ROBERT F. MCDONNELL

Defendant Appellant

FORMER VIRGINIA ATTORNEYS GENERAL; ANDREW P MILLER; ANTHONY FRANCIS TROY; J. MARSHALL COLEMAN; MARY SUE TERRY; STEPHEN DOUGLAS ROSENTHAL; MARK L. EARLEY; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; NANCY GERTNER, Law Professor; CHARLES J. OGLETREE, JR., Law Professor; JOHN C. JEFFRIES, JR., Law Professor; BENJAMIN TODD

JEALOUS; REPUBLICAN GOVERNORS PUBLIC POLICY COMMITTEE; FORMER STATE ATTORNEYS GENERAL (NON-VIRGINIA); BUSINESS LEADERS AND PUBLIC POLICY ADVOCATES; VIRGINIA LAW PROFESSORS; FORMER FEDERAL OFFICIALS; MEMBERS AND FORMER MEMBERS OF THE VIRGINIA GENERAL ASSEMBLY

Amici Supporting Appellant

ORDER

The "Motion to clarify order granting release pending appeal or, in the alternative, to stay the mandate pending resolution of a petition for certiorari" is DENIED. That is, the motion to clarify that our Order of January 26, 2015 will remain in force pending the disposition of a timely certiorari petition is DENIED. The alternative motion to stay the mandate is also DENIED. Pursuant to Federal Rule of Appellate Procedure 41(b), the mandate will issue seven days from the date of the entry of this Order.

For the Court
/s/ Patricia S. Connor,
Clerk

APPENDIX D

FILED: January 26, 2015

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-4019
(3:14-cr-00012-JRS-1)

UNITED STATES OF AMERICA

Plaintiff Appellee

v.

ROBERT F. MCDONNELL

Defendant—Appellant

ANTHONY FRANCIS TROY; MARY SUE TERRY; STEPHEN DOUGLAS ROSENTHAL; ANDREW P MILLER; J. MARSHALL COLEMAN; MARK L. EARLEY; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; NANCY GERTNER, Law Professor; CHARLES J. OGLETREE, JR., Law Professor;

Amici Supporting Appellant

ORDER

Upon consideration of the submissions relative to appellant's motion for release pending appeal pursuant to 18 U.S.C. § 3143(b), the court finds, by clear and convincing evidence, that appellant is not likely to flee or pose a danger to the safety of any other person or the community if released. The court further finds that the appeal is not for the purpose of delay and raises a substantial question of law or fact that, "if decided in favor of the accused" is "important enough" to warrant reversal or a new trial. *United States v. Steinhorn*, 927 F.2d 195, 196 (4th Cir. 1991) (per curiam).

The court grants appellant's motion and releases appellant on his own recognizance pending appeal, subject to the same conditions imposed by the district court for release pending trial.

The court will hear this case on the following expedited schedule:

Opening Brief and Joint Appendix:	Due March 2, 2015
Response Brief:	Due March 26, 2015
Reply Brief, if any:	Due April 8, 2015

Oral Argument will be held on May 12, 2015, in Richmond, Virginia, and is not subject to continuance.

For the Court
/s/ Patricia S. Connor, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Richmond Division

UNITED STATES OF AMERICA V	Case Number: 3:14cr00012-001 USM Number: 83758-083
ROBERT F McDONNELL Defendant.	Defendant's Attorney: JOHN BROWNLEE, ESQ., HENRY ASBILL, ESQ.

AMENDED JUDGMENT IN A CRIMINAL CASE
(ONLY CHANGE: Corrected Offense End date on Count 10)

The defendant was found guilty on Count(s) after a plea of not guilty to Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the Indictment.

The defendant is adjudicated guilty of these offenses.

Title and Section	*Nature of Offense*	*Offense Class*	*Offense Ended*	*Count*
18 U.S.C. 1349	CONSPIRACY TO COMMIT HONEST SERVICES WIRE FRAUD	Felony	3/2013	1

18 U.S.C. 1343	HONEST SERVICES WIRE FRAUD	Felony	5/26/2011	2
18 U.S.C. 1343	HONEST SERVICES WIRE FRAUD	Felony	3/12/2012	3
18 U.S.C. 1343	HONEST SERVICES WIRE FRAUD	Felony	5/22/2012	4
18 U.S.C. 1951	CONSPIRACY TO OBTAIN PROPERTY UNDER COLOR OF OFFICIAL RIGHT	Felony	3/2013	5
18 U.S.C. 1951 AND 2	OBTAINING PROPERTY UNDER COLOR OF OFFICIAL RIGHT	Felony	5/23/2011	6 & 7
18 U.S.C. 1951 AND 2	OBTAINING PROPERTY UNDER COLOR OF OFFICIAL RIGHT	Felony	5/29/2011	8

18 U.S.C. 1951 AND 2	OBTAINING PROPERTY UNDER COLOR OF OFFICIAL RIGHT	Felony	1/7/2012	9
18 U.S.C. 1951 AND 2	OBTAINING PROPERTY UNDER COLOR OF OFFICIAL RIGHT	Felony	3/6/2012	10
18 U.S.C. 1951 AND 2	OBTAINING PROPERTY UNDER COLOR OF OFFICIAL RIGHT	Felony	5/22/2012	11

The defendant has been found not guilty on Count(s) 12 and 13 of the Indictment.

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

01/06/2015
Date of Imposition of
Judgment

/s/
James R. Spencer
Senior U.S. District Judge

01/06/2015

Case Number: **3:14cr00012-001**
Defendant's Name: **ROBERT F. McDONNELL**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: TWENTY FOUR (24) MONTHS IMPRISONMENT ON COUNTS 1-11, ALL TO BE SERVED CONCURRENTLY.

The Court makes the following recommendations to the Bureau of Prisons:

THAT THE DEFENDANT BE DESIGNATED TO A FACILITY NEAR HIS HOME IN THE RICHMOND METROPOLITAN AREA.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons: before 2 p.m. on 02/09/2015. If no designation has been made, the defendant is to report to the U.S. Marshal in Richmond, Virginia.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
UNITED STATES MARSHALL

Case Number: 3:14cr00012-001
Defendant's Name: ROBERT F. McDONNELL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of TWO (2) YEARS ON COUNTS 1 11, ALL TO BE SERVED CONCURRENTLY.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and periodic drug tests thereafter, as determined by the court.

The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution obligation, it is a condition of supervised release that the defendant pay any such fine or restitution in

accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court set forth below:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within tile first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or any narcotic or other controlled substance or any paraphernalia related to such substances, except as prescribed by the physician;
8) the defendant shall not frequent places where controlled substances arc illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not

associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer for a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make notifications and to confirm the defendant's compliance with such notification requirement.

Case Number: 3:14cr00012-001
Defendant's Name: ROBERT F. McDONNELL

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release, pursuant to this Judgment, the defendant shall also comply with the following, additional special conditions:

1) The defendant shall not incur new credit card charges or open additional lines of credit without the approval of the probation officer.
2) The defendant shall provide the probation officer with access to requested financial information.
3) As reflected in the presentence report, the defendant presents a low risk of future substance abuse and therefore, the Court hereby suspends the mandatory condition for substance abuse testing as defined by, 18 U.S.C. 3563 (a)(5). However, this does not preclude the United States Probation Office from administering drug tests as they deem appropriate.
4) The defendant shall pay the balance owed on any court-ordered financial obligations in monthly installments of not less than $100, starting 60 days after supervision begins until paid in full.

Case Number: 3:14cr00012-001
Defendant's Name: ROBERT F. McDONNELL

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 7

Count	*Assessment*	*Fine*	*Restitution*
1	$100.00	$0.00	$0.00
2	$100.00	$0.00	$0.00
3	$100.00	$0.00	$0.00
4	$100.00	$0.00	$0.00
5	$100.00	$0.00	$0.00
6	$100.00	$0.00	$0.00
7	$100.00	$0.00	$0.00
8	$100.00	$0.00	$0.00
9	$100.00	$0.00	$0.00
10	$100.00	$0.00	$0.00
11	$100.00	$0.00	$0.00
TOTALS:	$1,100.00	$0.00	$0.00

No fines have been imposed in this case.

Defendant's Name: ROBERT F. McDONNELL
Case Number: 3:14cr00012-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

Payment to begin immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment (2) restitution principal (3) restitution interest (4) fine principal (5) fine interest (6) community restitution (7) penalties and (8) costs, including cost of prosecution and court costs.

Nothing in the court's order shall prohibit the collection of any judgment, fine, or special assessment by the United States.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA, v. ROBERT F. MCDONNELL, and MAUREEN G. MCDONNELL, Defendants.	Action No. 3:14-CR-12

MEMORANDUM ORDER

THIS MATTER is before the Court on Defendant Robert F McDonnell's Motion #51—Motion for Release Pending Appeal ("Motion") (ECF No. 601). Pursuant to 18 U.S.C. § 3143(b), the Court

> (1) shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for writ of certiorari, be detained, unless the judicial officer finds—
>
> (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to

> the safety of any other person or the community if released .; and
>
> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—
>
> (i) reversal,
>
> (ii) an order for a new trial,
>
> (iii) a sentence that does not include a term of imprisonment, or
>
> (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b). Here, there is no dispute as to the first prong, that being Mr. McDonnell is not likely to flee and does not pose a danger to the safety of any other person or the community. 18 U.S.C. § 3143(b)(1)(A). In analyzing the second prong, 18 U.S.C. § 3143(b)(1)(B), the Court must make two inquires after finding that the appeal is not taken for the purpose of delay: (1) "whether the question presented on appeal is a 'substantial' one;" and (2) "if decided in favor of the accused, whether the substantial question is important enough to warrant reversal or a new trial on all counts for which the district court imprisoned the defendant." *United States v. Steinhorn*, 927 F.2d 195, 196 (4th Cir. 1991) (citing *United States v. Miller*, 753 F.2d 19, 23-24 (3d Cir. 1985)). A substantial question has been defined as "'a 'close' question or one that very well could be decided the other way.'" *Id.* (quoting *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)).

Let the Clerk send a copy of this Order to all counsel of record.

It is SO ORDERED.

/s/
James R. Spencer
Senior U. S. District Judge

ENTERED this 13th day of January 2015.

APPENDIX G

FILED: August 11, 2015

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-4019
(3:14-cr-00012-JRS-1)

UNITED STATES OF AMERICA

Plaintiff Appellee

v.

ROBERT F MCDONNELL

Defendant—Appellant

FORMER VIRGINIA ATTORNEYS GENERAL; ANDREW P MILLER; ANTHONY FRANCIS TROY; J. MARSHALL COLEMAN; MARY SUE TERRY; STEPHEN DOUGLAS ROSENTHAL; MARK L. EARLEY; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; NANCY GERTNER, Law Professor; CHARLES J. OGLETREE, JR., Law Professor; JOHN C.

JEFFRIES, JR., Law Professor; BENJAMIN TODD JEALOUS; REPUBLICAN GOVERNORS PUBLIC POLICY COMMITTEE; FORMER STATE ATTORNEYS GENERAL (NON-VIRGINIA); BUSINESS LEADERS AND PUBLIC POLICY ADVOCATES; VIRGINIA LAW PROFESSORS; FORMER FEDERAL OFFICIALS; MEMBERS AND FORMER MEMBERS OF THE VIRGINIA GENERAL ASSEMBLY

Amici Supporting Appellant

ORDER

Before the Court is the appellant's petition for panel rehearing or rehearing en banc. On the petition for rehearing before the panel, no judge voted in favor of rehearing, and panel rehearing is thus denied.

A poll of the Court was requested on the appellant's suggestion for rehearing en banc. No judge voted in favor of rehearing en banc, and Judges Niemeyer, Motz, King, Duncan, Wynn, Floyd, Thacker, and Harris voted against rehearing en banc. Chief Judge Traxler and Judges Wilkinson, Gregory, Shedd, Agee, Keenan, and Diaz, deeming themselves disqualified, did not participate. Pursuant thereto, the petition for rehearing en banc is hereby also denied.

For the Court
/s/ Patricia S. Connor,
Clerk

APPENDIX H

18 U.S.C. § 201. Bribery of public officials and witnesses

(a) For the purpose of this section—

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official,

or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value

to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(c) Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;

shall be fined under this title or imprisoned for not more than two years, or both.

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel

and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

18 U.S.C. § 1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101 115, 151 166 of Title 29 or sections 151 188 of Title 45.

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA,	)	CRIMINAL NO. 3:14-CR-00012
v.	)	
ROBERT F MCDONNELL MAUREEN G. MCDONNELL	)	JUDGE JAMES R. SPENCER

ROBERT F. MCDONNELL'S PROPOSED JURY INSTRUCTIONS

* * *

Proposed Jury Instruction No. 58

Honest Services Wire Fraud—"Official Act" Defined

An "official act" means any decision or action on any question, matter, cause, suit, proceeding, or controversy which may at any time be pending or which may, by law, be brought before any public official in his or her official capacity or in his or her place of trust. The six terms—question, matter, cause, suit, proceeding, or controversy—refer to a class of questions or matters whose answer or disposition is determined by the government.

An act may be official even if it was not taken pursuant to responsibilities explicitly assigned by law to the official. Rather, a government official can perform an "official act" when it is a settled practice as part of the official's position for him to exercise influence over a government decision even if he does not have authority to make the final decision himself.

But the fact that an activity is a routine activity, or a "settled practice," of an office-holder does not alone make it an "official act." Many settled practices of government officials are not official acts within the meaning of the statute. For example, merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, "official acts," even if they are settled practices of the official. A government official's decisions on who to invite to lunch, whether to attend an event, or whether to attend a meeting or respond to a phone call are not decisions on matters pending before the government. That is because mere ingratiation and access are not corruption. Nor is an official's use of

his official position to promote a purely private venture. The questions you must decide are both whether the charged conduct constitutes a "settled practice" *and* whether that conduct was intended to or did in fact influence a specific official decision the government actually makes—such as awarding a contract, hiring a government employee, issuing a license, passing a law, or implementing a regulation.

Authority:

See 18 U.S.C. § 201(a)(3); *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 407 (1999) (distinguishing between actions that "are assuredly 'official acts' in some sense"—such as "receiving [] sports teams at the White House, visiting [a] high school, and speaking to [] farmers about USDA policy"—and the narrower category of "official acts" that fall within the bribery laws); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 360 (2010) ("Ingratiation and access are not corruption."); *United States v. Carson*, 464 F.2d 424, 434 (2d Cir. 1972) ("It is the corruption of official positions through the misuse of influence in governmental decision-making which the bribery statutes make criminal."); *United States v. Mandel*, 591 F.2d 1347, 1362 (4th Cir. 1979) ("[T]he 'fraud' involved in the bribery of a public official lies in the fact that the public official is not exercising his independent judgment in passing on official matters."); *United States v. Urciuoli*, 513 F.3d 290, 296 (1st Cir. 2008) (rejecting the argument that "trad[ing] on the reputation, network and influence that comes with political office" or using the "access and attention" that comes with a government title, or even the "(possibly improper) use of senate letterhead" were

sufficient—standing alone—to transform that conduct into an improper official action); *Valdes v. United States*, 475 F.3d 1319, 1324-25 (D.C. Cir. 2007) (en banc) (holding that the Government must prove that the defendant exerted "inappropriate influence on decisions that the government actually makes"); *United States v. Rabbitt*, 583 F.2d 1014, 1028 (8th Cir. 1978), *abrogated on other grounds by McNally v. United States*, 483 U.S. 350 (1987), *superseded by statute*, 18 U.S.C. § 1346 (reversing conviction where the most that the official did "was recommend [the alleged bribe payer] to state contractors as qualified architects and thereby gain them a friendly ear"); *United States v. Loftus*, 992 F.2d 793, 796 (8th Cir. 1993) (explaining that the conviction in *Rabbitt* was reversed because the official "promised only to introduce the firm to influential persons" and "did not promise to use his official position to influence those persons"); *United States v. Jefferson*, 674 F.3d 332, 356-57 (4th Cir. 2012) (holding that "the bribery statute does not encompass every action taken in one's official capacity" and that an "act must yet adhere to the definition confining an official act to a pending 'question, matter, cause, suit, proceeding or controversy,'" such that juries cannot "rely exclusively on [] settled practices"); *United States v. Ring*, 706 F.3d 460, 470 (D.C. Cir. 2013) (holding that a government attorney performed an official action when he "acted in his official capacity to influence the visa application process" and distinguishing between interfering with specific visa applications (an official act because it sought to improperly influence a governmental decision) and "making a purely informational inquiry" (an official act in some sense

but not one that sought to influence governmental action)); *United States v. Muntain*, 610 F.2d 964, 966-67 (D.C. Cir. 1979) (holding that an official's "use of his official position to promote a purely private venture created an appearance of impropriety , but it is not criminal").

* * *

APPENDIX J

JURY QUESTIONNAIRE

This questionnaire is designed to obtain information from you for the purpose of assisting the parties in selecting a fair and impartial jury in the case of *United States of America v. Robert F. McDonnell and Maureen G. McDonnell.* It's use will substantially shorten the jury selection process.

* * *

[Page 31]

112. Based on what you have read, heard, seen, and/or overheard in conversations, please tell us what opinions, if any, you have formed about the guilt or innocence of Robert F McDonnell: _____

_____

_____

_____

_____

_____

* * *

APPENDIX K

INDIVIDUAL FOLLOW UP QUESTIONS FOR JURORS WITH ANY PRE-TRIAL EXPOSURE:

You have indicated on your juror questionnaire that you have read, seen or heard something about this case or the people involved. There is nothing wrong with having read, heard or overheard something about the case, but now we need to know a little bit more about what you have heard, the circumstance of how you received that information and any impressions you have formed.

1. First when do you first recall that you read or heard something about the case, or any of the people involved?
2. Please describe or summarize what you have heard or read.
3. Did you talk about what you read or heard with your spouse or any of your family members, friends or co-workers? What was the nature of those conversations—what was said?
4. Have any of your family members, friends or co-workers or anyone else close to you expressed any opinion or view about the case or the people involved? If so, what could they say? Is this an opinion or point of view that you share?
5. Have you formed or expressed any views, opinions or conclusions about the case based on

anything you may have read or heard or overheard discussed? If so, what are those views or conclusion?

6. Have you shared or discussed your opinions about the case or the people involved with anyone at all?

7. Have you ever heard anyone say anything favorable or unfavorable in the past about either of the defendants in the case—former Governor Bob McDonnell or former First Lady Maureen McDonnell? If so, what things have you heard others say about either or both of the defendants?

8. Have you formed any favorable or unfavorable personal impressions about either defendant, former Governor Bob McDonnell or former First Lady Maureen McDonnell from anything you have heard about either defendant in the past, or as a result of these charges? (If so, what are those impressions? Were these strong impressions? How strong?)

9. Have you heard anyone say what he or she thought the verdict should be in this case? (If so, what is your relationship with the person or persons who expressed opinions? What was your reaction to hearing these opinions expressed? Did you agree or disagree?)

10. At any time have you ever formed or expressed any opinion about this case, or any of the people involved?

11. If you are selected to sit as a juror in this case will you be concerned about anything you have already read, seen or heard someone say about

this case? If so, please tell us about your concerns.

12. Do you have any concerns about what the reactions of any other people—such as family members, friends, co-workers or anyone else in the community or the media—may be to any verdict you might reach in the event you were selected to be a member of the jury in this case? If so, tell us something about your concerns.

13. Has what you have read, seen or heard discussed or thoughts about regarding these charges and the defendants caused you to lean in the direction of finding one or both of the defendants guilty, or not guilty? If so, please tell us how you are leaning.

14. Are these leanings, impressions or opinions going to be in the back of your mind if you are selected to sit as a juror in this case? Why or why not?

15. Would you need or require to hear from the defendant or his attorney, or expect the defendant or his attorney to present any evidence to change your mind about what you have previously heard or concluded in order to find Mr. McDonnell not guilty (regardless of the judge's instructions to the contrary)? If so, tell us why you would expect or require the defense to present evidence in order to reach a verdict of not guilty.

16. Will you be able to follow the Court's instructions to presume former Governor Robert F McDonnell is innocent of these charges and to require the government to

prove his guilt beyond a reasonable doubt, OR would it be difficult or impossible for you to find him not guilty unless the defense presented evidence or proof of his innocence? Please explain.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA,
Plaintiff;

v.

Criminal Action
3:14CR12

ROBERT F. McDONNELL and
MAUREEN G. McDONNELL,
Defendants.

July 28, 2014
Richmond, Virginia
10:00 a.m.

JURY TRIAL VOLUME I

BEFORE: HONORABLE JAMES R. SPENCER
United States District Judge

APPEARANCES: MICHAEL S. DRY, ESQ.
DAVID V HARBACH, II, ESQ.
JESSICA D. ABER, ESQ.
RYAN S. FAULCONER, ESQ.
Counsel for Government;

JOHN L. BROWNLEE, ESQ.
HENRY W ASBILL, ESQ.
JAMES M. BURNHAM, ESQ.
DANIEL I. SMALL, ESQ.

CHRISTOPHER M. IAQUINTO, ESQ.
Counsel for Robert F McDonnell;

WILLIAM A. BURCK, ESQ.
HEATHER H. MARTIN, ESQ.
STEPHEN M. HAUSS, ESQ.
Counsel for Maureen G. McDonnell.

JEFFREY B. KULL
OFFICIAL COURT REPORTER

* * *

[Page 136]

THE COURT:

* * *

All right. Does counsel for either side have any additional voir dire questions? I'll hear you at the bench.

Okay. *** (Juror Number 0364).

THE JUROR: Right here.

THE COURT: Okay. We just have a message for you.

All right. Just give her that note.

All right. Let's hear from you all.

(At Bench.)

MR. ASBILL: Judge, I've given them a copy. Here are the general questions that I thought about.

MR. DRY: Judge, can we be heard on this? Mr. Asbill has raised the issue of pretrial publicity in this case and he's at least expressed to me his opinion that if the Court does not ask each and every person that ever heard about this.

The government doesn't believe that that is the case. However, in an abundance of caution, at least for those individuals that have said that they have very closely or somewhat closely followed the case, it might be advisable for us to do some limited inquiry or bring them up or something so that there's no issue on the record, unless Mr. Asbill has changed his position on this.

THE COURT: Well, I mean, I appreciate his position, but that's not the Court's position. Look,

they answered the questionnaire closely, and then they went on to answer questions that without giving us some pause or not. If it didn't, then what I would do with these questions is try to determine if anything has happened since the questionnaires. I mean, I will ask the question so that we can see if there are—anybody responds to, you know, having discussions or anything that happened.

MR. DRY: Let me be clear. That's satisfactory to the government. Mr. Asbill —

THE COURT: Mr. Asbill can speak for himself. But if that's his position, that's fine. But in terms of what I'm going to do here, I'm not going to do what you suggest. I'm just not going to do it.

MR. ASBILL: Well, Judge, the reason I'm asking for much more inquiry with respect to pretrial publicity is this. For example, one of the jurors said that she hadn't followed the case at all, and so—she said barely at all, and then we checked after that, all the resources that she said had said things about the case. So there's some confusion. It's very subjective, number one.

Number two, if anybody sees a news article or watches one program that really makes an impact, the fact that they haven't watched it multiple times or seen a lot of publicity about it, that can't make an indifference if they have an indelible impression from one source. That is a problem. A lot of these people have expressed—have not come forward when you asked the general question about is there any reason why you could not be fair. We have a list of folks that we think should be stricken for cause, some of which—for example, classic example is, 0154 followed

the case very closely, expressed an opinion there are no honest politicians and governor should have known. And that person did not answer the question about do you have any bias or problems that would impact your ability to be fair.

So—and my position is that if somebody is exposed to pretrial publicity, they have to be individually voir dired, and I have a list of questions I'd like to give to the Court that I think they should be asked.

THE COURT: Okay. Well, you can provide the questions. It's the other way around to strike for cause those people without asking questions. If we think they are—well, what you're—I mean, what is—this is what you're going to have to do. You're going to have to identify specifically the people that you think should be struck for cause, and the Court will make an assessment of that based on information that we have. I'm not asking these questions. I'm not going to do it.

As I say, I'll do something in my invention. All right. Anything else?

MR. DRY: No, Your Honor.

THE COURT: All right. Thank you. You all can have a seat.

MR. HARBACH: Just a reminder about the Quinn Emanuel question.

THE COURT: I'm sorry. About the Quinn Emanuel question. Sure.

(In Open Court.)

THE COURT: I asked you all earlier about any connections to the law firms representing Mr.

McDonnell and I did not ask you about the law firm representing Ms. McDonnell, Quinn Emanuel.

So let me ask you those same questions. As far as you know, have you or any member of your family ever been represented by the law firm of Quinn Emanuel in Washington, D.C.?

And as far as you know, have you or any member of your family ever been represented by any of these lawyers individually who are representing Ms. McDonnell?

All right. Obviously, this case has generated a lot of media interest and there have been quite a few newspaper articles, radio and television media items relating to this case and the parties involved. And I'm sure that most of you have read in the newspaper or seen on television or heard on the radio, at least once, some of these media items or news stories. So the first thing I want you to do is if you have read, heard or seen something in the media, I want you to stand up for me, please.

All right. I've got a couple questions for—obviously, this is going to take a while. Now, let me ask you this general question. I may have some questions for you at the bench. Based on what you have heard or read or seen relating to this case, if you are, in your mind, able to put aside whatever it is that you've heard, listen to the evidence in this case and be fair to both sides, then I want you to sit down. All right.

All right. Mr. Asbill, would you please—would you all come here?

(At Bench.)

THE COURT: All right. If you've got a list of specific folks, because I'm satisfied with these—the

responses, but if you got specific folks who we need to look at specific responses, let me know

MR. ASBILL: Can I just make a record on this question, this particular question?

THE COURT: Sure.

MR. ASBILL: I understood that everybody said they could be put aside. I can't trust the credibility of that without a further inquiry and I can't make any judgments or arguments to you without any further inquiry. Specifically people who have expressed opinion about the case, 455, *** (Juror Number 0455).

THE COURT: Okay. Wait a minute. Let me get my list out here. You said 455?

MR. ASBILL: 455, *** (Juror Number 0455). Indicated on question 86 she has expressed an opinion about the case.

THE COURT: Question 86. Okay.

MR. ASBILL: 187, *** (Juror Number 0187). Indicates in question 84 that he has followed the case very closely from multiple news sources.

THE COURT: Just give me the number again.

MR. ASBILL: 086—excuse me. I'm sorry. 0187

THE COURT: 0187

MR. ASBILL: Right, and then question 84 and question 86, followed the case very closely, multiple news sources and has formed an opinion of guilt.

THE COURT: Well, I'll take a look, but I went through these things with a fine-tooth comb and he didn't even register on my list, but okay. I'll take a look. *** (Juror Number 0187).

MR. ASBILL: All right. 0200, *** (Juror Number 0200).

THE COURT: 0200? Okay. And what was the number on Ms. *** (Juror Number 0455) again?

MR. ASBILL: 0455.

THE COURT: 0455.

Okay. Now, 0200. What's her name?

MR. ASBILL: *** (Juror Number 0200).

THE COURT: Okay. She discussed it with her husband.

MR. ASBILL: Well, has received news from multiple sources and then has expressed, in question 86. extreme negative opinions or conclusions about the defendants.

THE COURT: Okay. All right. Next.

MR. ASBILL: 220, 0220, *** (Juror Number 0220). Questions 85 and 86. Multiple news sources. Formed opinion. Reached conclusion about guilt. They both should know gift limits.

THE COURT: Okay. I will do that. Next.

MR. ASBILL: 452 is *** (Juror Number 0452). Question 85, multiple news sources. And 86, formed an opinion, morally and ethically wrong.

THE COURT: 0452. Okay. I have that one too. I actually have that one too. All right.

MR. ASBILL: 0229, Ms. *** (Juror Number 0229), who is at the AG's Office. I'm not sure what the opinion is, but what I want to raise with you about the publicity is that she apparently has discussed the indictment with her students and they have conducted some sort of a mock trial about the case.

THE COURT: Okay. VCU class. Discussed the indictment.

MR. ASBILL: I thought it said something about mock.

154, *** (Juror Number 0154). That's the one following the case. That's the one I talked about before has followed the case before, expressed the opinion there are no honest politicians. The governor should have known.

THE COURT: The governor should know the limit on gifts. Okay.

MR. ASBILL: 0190, *** (Juror Number 0154). I'm sure he can follow your instructions. He followed the case very closely. Multiple news sources. Had discussions about the case and people have expressed and formed opinions in his discussions. He's also an active democratic campaign person.

MR. DRY: Are we talking about pretrial publicity or —

MR. ASBILL: Well, I want to go for further —

THE COURT: I'll just limit it right now to pretrial publicity.

MR. DRY: Okay.

THE COURT: Those are the ones that were most problematic.

All right. We'll bring them up here.

(In Open Court.)

THE COURT: *** (Juror Number 0455). If you would come up to the bench for us, please.

(At Bench.)

THE COURT: Just come up. Just one second.

THE JUROR: Okay.

MR. DRY: Judge, we have the questionnaire right here. On 86 it was no.

THE COURT: Mr. Asbill?

MR. ASBILL: I'm just going to take a look for a second. Sorry.

THE COURT: Okay. I didn't see anything.

I'm sorry, ma'am. We thought there was something on your questionnaire. So you can have a seat.

THE JUROR: Thank you.

(In Open Court.)

THE COURT: Okay. *** (Juror Number 0187). Number 84.

(At Bench.)

MR. DRY: Here's the full question there, sir. 84 is the last page or right there.

THE COURT: Okay. Mr. *** (Juror Number 0187). Let me ask you, you indicated that you followed the case very closely and we just want to explore that a little bit.

THE JUROR: Explain it to you? Oh, well, I followed it ever since it hit the paper because, I mean, I stay up on news and stuff that goes on, the news.

THE COURT: Okay.

THE JUROR: And I may—I read whatever—the paper all the time.

THE COURT: Okay. Have you formed any opinion about the guilt or innocence of these folks?

THE JUROR: Well, it's kind of hard to point an opinion now and tell you how the trial has been bearing on because it's been known that some things in the paper can't be true. I give you my opinion. It's an opinion. You can't believe everything people say. You have to sit around and judge for your own self because the news can influence you to go do different things. So what I do, I have my own opinions on it. That's why I told them I didn't know if he was guilty or not until I hear all the evidence.

THE COURT: That's good enough for me. You can have a seat.

THE JUROR: All right.

(In Open Court.)

THE COURT: *** (Juror Number 0200).

(At Bench.)

MR. DRY: Thank you, sir. Would you like this one?

THE COURT: Makes it easy for me.

THE JUROR: Yes, sir.

THE COURT: Okay, Ms. *** (Juror Number 0200). Let's see. Okay, Ms. *** (Juror Number 0200). You indicated that you had a discussion about what you had heard about the case with your husband.

THE JUROR: Uh-huh.

THE COURT: Obviously, that's natural. There's nothing wrong with that.

THE JUROR: Right.

THE COURT: We just wanted to explore the nature of that conversation. Did you all—did you or your husband have some opinion about the guilt or innocence of the people charged?

THE JUROR: No, not exactly. He usually brings it up before I do because he's really into watching CNN and everything. So he like brought up the situation. But I don't remember ever saying one way or the another whether they were guilty or not guilty.

THE COURT: Based on everything you've heard, even the discussions with your husband, you still feel that you would be able to be fair to both sides in this case?

THE JUROR: Yes, sir.

THE COURT: Okay. Thank you.

All right. Thank you.

THE JUROR: Uh-huh.

(In Open Court.)

THE COURT: *** (Juror Number 0220).

(At Bench.)

THE COURT: Come on up here.

MR. DRY: It's fine, ma'am. Come up there. There you go.

THE COURT: We just wanted to explore with you a little closer something you put in the questionnaire. And I'll just read it here. It says "I"—I can't read the second word—"thought that they should know the limits of the law related to gifts."

Now —

THE JUROR: That was just my thought. I don't know if it's—if it's evidence or, you know, there's evidence to that effect.

THE COURT: Okay. And you expressed this to your husband; is that —

THE JUROR: No.

THE COURT: It's just your thought?

THE JUROR: No. It's just my thought.

THE COURT: And is that a thought based on what you heard on the news?

THE JUROR: On the news. And I have not watched any news or read anything since.

THE COURT: Since this?

THE JUROR: Since receiving the summons, right.

THE COURT: Okay. Now, I want you to search your heart and your mind. As you stand here now, do you feel that you can be fair and impartial to both sides, put aside anything that you —

THE JUROR: Yes, because the evidence has to be given here.

THE COURT: Okay. All right. Thank you.

THE JUROR: Uh-huh.

(In Open Court.)

THE COURT: *** (Juror Number 0452).

(At Bench.)

THE JUROR: Yes, sir.

THE COURT: Yes, ma'am. We just wanted to explore with you a little closer something you said in your questionnaire.

THE JUROR: Okay.

THE COURT: You indicated that you had conversations with friends and co-workers and your opinion, maybe not technically something in the law, but ethically wrong. But that's what you heard in the newspaper and discussions with friends.

THE JUROR: Basically that I don't know whether—the rule of law. I don't know whether laws were broken. That's what this is about. I do feel like they knew that they were doing something that wasn't quite right, and that was my opinion.

THE COURT: Okay. And that's your opinion today?

THE JUROR: I'm willing to give them—I mean, I'm willing to listen to everything. Like I said, I know that the rule of law—I don't know what it is, and that is what this case is based on.

THE COURT: Okay. All right. You can have a seat.

THE JUROR: Thank you.

THE COURT: Ms. *** (Juror Number 0452) is out. I'm taking her out. Okay. *** (Juror Number 0452) is out for cause.

MR DRY: Mr. Asbill, you don't object?

(In Open Court.)

THE COURT: *** (Juror Number 0229).

(At Bench.)

MR. DRY: Judge, this is 87 Discussed it in the classroom at VCU.

THE COURT: Come on up, Ms. *** (Juror Number 0229). How are you doing?

THE JUROR: Fine.

THE COURT: We wanted to just explore with you a little bit more something that you put in the questionnaire, and you talked about your class at VCU having a discussion. Describe that for me. What went on?

THE JUROR: I showed them the indictment, and we were talking about the difference between state and federal jurisdiction and the difference between civil and criminal. It was used as an example for them.

THE COURT: And was there any exploring with the students for their opinions as to guilt or innocence?

THE JUROR: No. No. It was just what the indictment said. They were undergraduates. So I was just illustrating jurisdictions, state versus federal.

THE COURT: State versus federal.

THE JUROR: Criminal versus—just criminal.

THE COURT: Is there anything about what happened there at VCU and any other media items you might have reviewed that would prevent you from being fair to both sides in this case?

THE JUROR: I don't think so.

THE COURT: Okay.

THE JUROR: I haven't been listening since I got the summons. So —

THE COURT: So you followed the direction of the Court?

THE JUROR: Yes. I just covered my ears like that.

THE COURT: All right. Thank you very much.

THE JUROR: Uh-huh.

(In Open Court.)

THE COURT: *** (Juror Number 0154).

(At Bench.)

THE COURT: All right. Let me see what we have here. Okay. Ms. *** (Juror Number 0154), we just wanted to explore with you something that you had in your questionnaire just to see what it was about. Question number 86, you had conversation with friends and then you said that—that you weren't sure—something—such a thing as an honest politician and then you—it sounds like a lament to me, "The governor will not be remembered for whatever good he's done but for what he's accused of." Now, we just want to understand what you were talking about.

THE JUROR: Okay. What I was talking about was no matter whether he wins, lose or draw, the scandal will be attached to his name and to his term. Politicians—I made a statement about a politician because I think to get to the office, if they have got a smile in one direction to make you believe them, they'll do it. They'll smile another direction, they are going to do it. In other words, they want your vote so, you know, they are going to cater to you a little bit.

THE COURT: Okay

THE JUROR: If they want the women's vote, they'll cater to the women. That's what I meant by that.

THE COURT: Okay. All right. Thank you. You can have a seat.

I'm going to take her out. Generalized a view that's pretty solid.

MR. DRY: No objection, Your Honor.

MR. ASBILL: No objection.

(In Open Court.)

THE COURT: *** (Juror Number 0190).

(At Bench.)

Mr.*** (Juror Number 0190), we just wanted to question you a little closer about something that you put in your questionnaire. This is question number 86. And you put down, "I thought it was wrong if this is true," and you discussed it with family members and co-workers, right?

THE JUROR: (Nodding head.)

THE COURT: So just tell us, what did you mean by that?

THE JUROR: Say the question again.

THE COURT: It's number 86. And you put, "I thought it was wrong if this is true. Talked with family and co-workers about the case."

THE JUROR: I think when I filled it out, I was thinking like actually before I was just selected, like before I heard it on the media. So I didn't want to say I was talking to anybody. So I think that's why I put that. But not as in like if I was selected to, I wouldn't talk to anybody about it.

THE COURT: Okay. Yeah, yeah. You were explaining that you talked with your co-workers and friends before you got the questionnaire?

THE JUROR: Before the questionnaire, yeah.

THE COURT: And now I'm trying to explore this other comment, you thought it was wrong if this is true what do you mean by that? If the evidence supports the accusations made, you think it's wrong?

THE JUROR: If the evidence—can I see the question?

THE COURT: Huh?

THE JUROR: Can I see the question? I'm just trying to—oh, so what I was saying was that if I thought he would be in the wrong, if the evidence backed up the fact that he did do something wrong. So—that I thought it was wrong if it was true. So if I determined that the evidence was true, then I thought that what he did was wrong or what she did.

THE COURT: Okay. Now, what I need to know from you, sir, is—and I'm—you know, as serious as you can be and as honest as you can be, based on what you've heard, based on that previous thoughts in your head, can you be fair to both sides in this case?

THE JUROR: Yes.

THE COURT: All right. Thank you. You can have a seat.

Okay. I think that's it.

MR. DRY: Judge, can we have that questionnaire back?

THE COURT: Yeah.

MR. DRY: Thank you, Judge.

THE COURT: Okay. Anybody else?

MR. ASBILL: Not on publicity.

* * *

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA,
Plaintiff;

v.

Criminal Action
3:14CR12

ROBERT F McDONNELL and
MAUREEN G. McDONNELL,
Defendants.

July 29, 2014
Richmond, Virginia
10:00 a.m.

JURY TRIAL - VOLUME II

BEFORE: HONORABLE JAMES R. SPENCER
United States District Judge

APPEARANCES: MICHAEL S. DRY, ESQ.
DAVID V HARBACH, II, ESQ.
JESSICA D. ABER, ESQ.
RYAN S. FAULCONER, ESQ.
Counsel for Government;

JOHN L. BROWNLEE, ESQ.
HENRY W ASBILL, ESQ.
JAMES M. BURNHAM, ESQ.
DANIEL I. SMALL, ESQ.

CHRISTOPHER M. IAQUINTO, ESQ.
Counsel for Robert F McDonnell;

WILLIAM A. BURCK, ESQ.
HEATHER H. MARTIN, ESQ.
STEPHEN M. HAUSS, ESQ.
Counsel for Maureen G. McDonnell.

JEFFREY B. KULL
OFFICIAL COURT REPORTER

[Page 196]

All right, government, are you ready to proceed?

MS. ABER: Yes, Your Honor.

THE COURT: All right. Let's turn the lectern around.

MS. ABER: For more than 30 years, the defendant, Robert F. McDonnell, has been a public servant.

* * *

[Page 200]

Now, I'm going to tell you right up front, let it be known, the government does not have to show an explicit agreement. You are not going to hear definitely not going to hear a recording, see a video of any sort of shady back alley deal in which Mr. Williams and Mr. McDonnell meet and exchange a paper bag full of case in exchange for a state contract. You are not going to hear it, the law doesn't require it, and it is not a movie. Candidly, the defendants, you will hear, are way too sophisticated for that. And you are not going to hear that Mr. McDonnell helped Mr. Williams get legislation or a state job. Mr. Williams does not, you will hear, under the law, have to get a dime of state money. You will learn that those things are not necessary for the defendants to be guilty. The law simply requires that Mr. McDonnell agreed to take official action on Mr. Williams' behalf.

* * *

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA,
Plaintiff;

v.

Criminal Action
3:14CR12

ROBERT F McDONNELL and
MAUREEN G. McDONNELL,
Defendants.

July 31, 2014
Richmond, Virginia
9:45 a.m.

JURY TRIAL—VOLUME IV

BEFORE: HONORABLE JAMES R. SPENCER
United States District Judge

APPEARANCES: MICHAEL S. DRY, ESQ.
DAVID V HARBACH, II, ESQ.
JESSICA D. ABER, ESQ.
RYAN S. FAULCONER, ESQ.
Counsel for Government;

JOHN L. BROWNLEE, ESQ.
HENRY W. ASBILL, ESQ.
JAMES M. BURNHAM, ESQ.

DANIEL I. SMALL, ESQ.
CHRISTOPHER M.
IAQUINTO, ESQ.
Counsel for Robert F.
McDonnell;

WILLIAM A. BURCK, ESQ.
HEATHER H. MARTIN, ESQ.
STEPHEN M. HAUSS, ESQ.
Counsel for Maureen G.
McDonnell.

JEFFREY B. KULL
OFFICIAL COURT REPORTER

JONNIE RAY WILLIAMS, SR.,

called as a witness by and on behalf of the government, having been first duly sworn by the Clerk, was examined and testified as follows:

* * *

[Page 727]

Q You previously mentioned that Ms. McDonnell told the Roskamp attendees that the launch of Anatabloc would happen at the Governor's Mansion, right? You talked about that a little bit yesterday.

A Yes.

Q Or very early this morning. Was there in fact an event at the Mansion for Anatabloc on August 30th, 2011?

A There was.

Q What was the purpose of the event?

A That was the day that the company launched Anatabloc for sale. And it was the physical launch of that. Associated with the launch that day was tied in with the Governor's Mansion, with a luncheon at the Governor's Mansion.

Q And who was going to be attending this luncheon?

A Doctors from Johns Hopkins, doctors from University of Virginia, doctors from VCU, prominent doctors here in Richmond, Maureen McDonnell, the Governor, Mr. Roskamp, the philanthropist behind the Roskamp Institute, and doctors from the Roskamp Institute.

Q How was the date of the event selected?

A I believe it was selected on a day that was convenient to have the use of the Mansion and the Governor and Maureen McDonnell's schedules.

Q You mentioned the Governor twice. Did you want the Governor to attend the event?

A I did.

Q First of all, did you discuss that with Ms. McDonnell?

A I did.

Q What did you tell her?

A I said, "We need the Governor there."

Q What did she say?

A "Okay."

Q So why did you want the Governor to attend?

A Well, I had this dilemma of I'm going to pursue the prescription version of Anatabine because it needs to be in a prescription form so that doctors have the testing and know how much to dose. And that was going to take a number of years. And I had these physicians here from the medical schools so that they would become interested in it and doing the testing on Anatabloc itself, not necessarily the drug version, because it appeared to have a food-safe profile, and to have Virginia, the seal of Virginia and have Virginia's medical schools behind it, and to have the doctors from Johns Hopkins that have been doing the basic testing to validate all of this work with the doctors in Virginia. As it is a Virginia study for Anatabloc, I thought that made good business sense. That would be very good for our company.

Q I understand you wanted to get the studies at UVA and VCU done. I think my question is, why did you want the Governor in the meeting between your company and the UVA and VCU people, doctors?

A Because it sends a signal to those medical schools that this is important. The credibility associated with it.

Q And did you discuss that with Ms. McDonnell?

A I did.

Q Was Ms. McDonnell supportive of the idea of having this event at the Mansion?

A It was her idea.

Q What do you mean it was her idea?

A At the Roskamp Institute, when she announced it.

Q All right. It might have been her idea, but who decided who to invite? Who is the one that's actually saying, "I want that doctor, that doctor, that doctor, this person, this person, this person"?

A Me.

Q On the day of the event, did you bring any samples of Anatabloc?

A I did.

Q And why did you bring samples of Anatabloc?

A I wanted to make sure everyone knew they could take the product with them. It was the day of the launch, the day of the introduction of this product. I was proud of it. I thought it was—I actually thought it was an historical moment; that from this tobacco plant, which I brought tobacco plants from the farms out in Virginia, from a farm in Southside

Virginia, to use that to explain to everyone at that meeting that hidden in this tobacco plant was Anatabine that was responsible for the health benefits from tobacco.

Q When you said that you wanted samples to be available for the attendees, were the samples actually placed at each place setting?

A They were.

Q And who did that?

A I don't know particularly who set them, who the person was that put it beside each one, but it was, I believe it was my idea to do that.

Q Okay. Walk us through what happens during this event. First of all, is the Governor there at the beginning?

A No.

Q All right. Well, walk us through generally what happens at this event.

A I was at the end of one table, Maureen McDonnell was at the end of the other. First she spoke and welcomed the doctors, and shared again with them why this was important to her, and how exciting this was to have this launch here, introduction at the Governor's Mansion, and to have physicians from the medical schools in Virginia here to get involved and study and test Anatabine.

Q And after Ms. McDonnell speaks, what happens?

A I spoke next.

Q Okay. You mentioned tobacco leaves. What are you doing with tobacco leaves during your chat?

A Well, that's where I discovered Anatabine, you know. From working with, you know, it was part of—I've been working with it for years with organic chemists from the University of Kentucky. So I thought I would bring the tobacco plant just as a prop to be able to show the doctors where I found this anti-inflammatory.

Q Does the Governor come in at some point?

A He did.

Q Do you remember roughly when?

A Towards the end. He sat down and was eating lunch.

Q So everybody ate lunch during this event?

A Yes.

Q Okay.

A And he began asking the doctors their questions.

Q When you say "the doctors their questions," had doctors given presentations during the lunch?

A Dr. Ladenson was talking about it, Dr. Wright was talking about it, our medical director. I don't recall much after that.

Q You said that the Governor was asking questions. Can you kind of describe what's going on at this point?

A Asking questions like, you know, "What are the end points here? What are you looking for to show efficacy with the studies? How are you going to proceed with that?"

Q And did you think the Governor's attendance was helpful?

A Yes.

Q When he is asking questions, is he expressing any support for Star, the idea of further studies?

A He was generally supportive. I mean, that was the purpose.

Q Did you give any money out to UVA and VCU?

A We handed out eight checks for $25,000 apiece to doctors at the medical institutions, including doctors from Johns Hopkins, so that they could prepare the grant applications to study this and whether it was for gastroenterology, cardiology, endocrinology, osteoarthritis, a variety of disorders.

Q So what's the plan, sir? You give the $25,000 grants to the research universities. What are they supposed to do with those? Use that money to do what?

A They are supposed to use that money because preparing a grant application is a lot of work. It is not just simple application. It requires a lot of work, a lot of back-up material, the trial, the study design of what it is that you are going to do. And so the idea was to prime the pump, to assist them in funding so they would have the incentive to have the cost of preparing, covering the cost of preparing, the time it takes to prepare the application so that it could be submitted to, hopefully, the Tobacco Commission for funding.

Q All right. Just so we are clear, they are going to do basically a study proposal.

A Yes.

Q That's going to be turned into a grant application.

A Yes.

Q And that's going to hopefully go to the Virginia Tobacco Commission. That's the plan.

A That's the plan.

Q Okay. Did you think that having the event at the Governor's Mansion was helpful to your company?

A I did.

Q Why?

A The credibility that came with that. I'm trying to have this tested in Virginia. The doctors from Johns Hopkins are helping me with the doctors in Virginia because I don't know them at the medical schools. And with an institution like Johns Hopkins, with physicians contacting their colleagues here at Virginia medical schools, I felt like I had their attention. And since it was going to be done in Virginia, to have the crown of it or the "Virginia Study" or, you know, "This is what happened in Virginia."

Q As of the date of that event, what were the things that you had already given to the McDonnells?

A Plane trips, shopping spree.

Q $50,000 loan?

A $50,000 loan, a $15,000 catering bill, golf trips—I mean golf outings. I don't know, maybe some other things.

Q Which of those things did you give to the McDonnells because you thought that they were your friends?

A The McDonnells were not my personal friends.

Q But why are you giving them this stuff then?

A I thought it was good for our company.

Q Do you think you would have had that event had you not given them things of value?

A No, I did not.

* * *

[Page 760]

BY MR. DRY:

Q All right. Let's go to the bottom e-mail. And who is Ms. Carolyn Birgmann, sir?

A She's a sales representative in Virginia.

Q Okay. I'm going to read what Ms. Birgmann wrote to Ms. McDonnell. Subject line, "MD e-mail addresses." I'm going just going to read the first sentence, and you let me know if I'm reading it correctly. "Hi, Maureen. I hope you are doing well! Jonnie Williams, Sr. has asked me to compile a list of MDs in the area for you to include on your invitation list for the event coming up the end of February."

Had you asked Ms. Birgmann to give this list to Ms. McDonnell?

A Yes.

Q Why?

A Because the Healthcare Leaders Reception was an annual event held at the Governor's Mansion to recognize healthcare leaders, and I was given the opportunity to invite people, doctors, to the reception.

Q What do you mean you were given the opportunity?

A Maureen McDonnell called me and said, you know, invite all the doctors that you want to invite to the Healthcare Leaders, to the meeting.

Q And who did you want to invite?

A Besides local physicians?

Q Yes.

A Dr. Ladenson and a colleague of his, Dr. Crantz.

Q And how about Star folks?

A Yes, employees from Star as well.

Q And did you want to go?

A I did.

Q Okay. And can we go—well, hold on before that.

When you said that you wanted to invite local doctors, why did you want to invite local doctors?

A Because they would be there and see that our company was there, and we would get the opportunity, at the Governor's Mansion at the reception, to talk to various doctors.

Q And what were you hoping these doctors would do?

A I was hoping they would do the same thing that we were traveling around the country for is to share with them what we had discovered and to learn about Anatabloc.

Q But did you want them to do something with their patients after they learned about all this?

A I did. I wanted them to use the product because it would be good for the company.

Q Okay. And let's go to the top portion of the e-mail. This is Ms. McDonnell response, and you're cc'd on this. All right. I'm going to read this. Just let me know if it's incorrect.

"P.S. By the way, the docs we are identifying for the reception are healthcare industry leaders in Virginia.

Thanks, Carolyn! We appreciate the list of docs that you sent, but wanted you to know that you didn't have to limit them to this area. It's a reception for healthcare leaders from all over the state of Virginia, so please expand on your list. I checked our number of invites, and if Jonnie has any more than these 39 docs, send them along because we have room to invite more. We may already have some of these docs on our invite list. So if you can put them in alphabetical order, we can run your list against ours and remove the duplicates. We're actually sending out invitations this week, and I was wondering if you also have the physical addresses of the docs you're referring? If so, and if it's not too much trouble, could you send them over to us? Thanks so much for your help."

Did you think it was a benefit to your company that you'd be able to invite who you wanted to the Healthcare Leaders Reception?

A I did.

Q Why was that—

A Well—

Q — just briefly?

A Anytime in front of the showcase of the Governor's Mansion, the credibility that comes with

presenting your product to someone, it automatically takes on an importance from the credibility.

Q Okay.

* * *

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA,
Plaintiff;

v.

Criminal Action
3:14CR12

ROBERT F. McDONNELL and
MAUREEN G. McDONNELL,
Defendants.

August 5, 2014
Richmond, Virginia
9:30 a.m.

JURY TRIAL—VOLUME VII

BEFORE: HONORABLE JAMES R. SPENCER
United States District Judge

APPEARANCES: MICHAEL S. DRY, ESQ.
DAVID V HARBACH, II, ESQ.
JESSICA D. ABER, ESQ.
RYAN S. FAULCONER, ESQ.
Counsel for Government;

JOHN L. BROWNLEE, ESQ.
HENRY W. ASBILL, ESQ.
JAMES M. BURNHAM, ESQ.

DANIEL I. SMALL, ESQ.
CHRISTOPHER M. IAQUINTO, ESQ.
Counsel for Robert F McDonnell;

WILLIAM A. BURCK, ESQ.
HEATHER H. MARTIN, ESQ.
STEPHEN M. HAUSS, ESQ.
Counsel for Maureen G. McDonnell.

JEFFREY B. KULL
OFFICIAL COURT REPORTER

MOLLY HUFFSTETLER,
called as a witness by and on behalf of the government, having been first duly sworn by the Clerk, was examined and testified as follows

* * *

[Page 1490]

A July 31st, 2011, time, 11:29 p.m.

Q If we could scroll up a little bit. Forgive me, we will need to go back to the first page, the very bottom, just to see who sent this next e-mail. Who is that, ma'am?

A Bill Hazel was my direct report, Secretary of Health and Human Resources.

Q Then this e-mail that bleeds onto the second page of Government's 191 is sent to whom?

A This was sent to the deputies in the office, Matt Cobb and Keith Hare.

Q When you say the deputies in the office, what do you mean?

A They would have been essentially second in the chain of command to Secretary Hazel.

Q Were they supervisors of yours as well?

A More co-workers than supervisors. We were all direct reports.

Q Okay. Back to the first page now, the next e-mail in the chain is the first one that you appear on. It is from Mr. Cobb to you, a little bit later on the morning of what date?

A Monday, August 1st, 2011.

Q And who is Keith there?

A Keith would be the corresponding deputy.

Q Okay. If we could scroll up a little bit to see what your response was to that request. You say, "Um-hum, tic-tac man." And this is at what time?

A That was at 9:46 a.m.

Q So about an hour-and-a-half later. Before we get to who Tic-Tac Man is, do you recall having any conversations in the intervening hour-and-a-half with any of your colleagues about this issue?

A I do not.

Q Okay. So now tell us what your reference to Tic-Tac Man means.

A Sure. Following a previous meeting that Mr. Williams had with my boss, Secretary Hazel, sample products as a custom were left behind that resembled Tic-Tacs and we therefore referenced Mr. Williams as the Tic-Tac Man.

Q Okay. But before we move on, I neglected to ask you a question about the preceding e-mail. I apologize. This one where Mr. Cobb is asking if you can cover. The last sentence on that e-mail says, "It is a Governor request." My question for you is, what did that communicate to you?

A It communicated that it was a direct request from the Governor. Sometimes meetings originated directly from the Secretary, sometimes from the Governor. He was just pretty much describing where it was coming from.

Q Was that important to you?

A Of course.

Q If we could scroll up a little bit, please. Briefly pause on Mr. Cobb's response. He tells you "Have a good time." Then the next e-mail from you, fair to say this is tongue-in-cheek?

A Yes, sir.

Q Let's keep going. More joking from Mr. Cobb in the reply?

A Yes.

Q All right. Then finally, if we could blow up so we can see the header on this, too, Mr. Starnes. This last one is sent by you at what time on the 1st?

A 10:22 a.m.

Q Okay. And it says: "On a more serious note, I am not planning to commit to anything but will just stick with we will do what we can to carry out the desires of the Governor and First Lady." Then you sign it. My first question is, why did you say that you were not planning on committing to anything?

A I didn't believe it was my role to. I was there to listen to information and take that back for further action if requested.

Q Okay. Then the end of the sentence says, "We will do what we can to carry out the desires of the Governor and First Lady."

Did you mean specific to this particular issue or just in general?

A I believe specific to this issue as written in context.

Q What did you understand the desires of the Governor and the First Lady to be specific to this issue?

A At the time of the note, nothing more than attending the meeting.

Q Thank you, ma'am. You can take that exhibit down. Now, did you in fact meet with Ms. McDonnell and Mr. Williams that morning, August 1st?

A Yes.

Q Tell us about that. How did you physically get from the Patrick Henry Building to wherever the meeting took place?

A I simply walked out of my office over to the Mansion property.

Q Is that where the meeting was, in the Mansion?

A Yes, sir.

Q Could we take a look at what's in evidence as Government's 186, please. Just blow up the middle of the page. The jury is familiar with this document. You have seen this document in meetings before you came in here, right?

A Yes, sir.

Q It is a Mansion log. Is that right?

A Yes, sir.

Q And just briefly, tell us, what time it indicates you arrived at the Mansion.

A It indicates that I arrived at 9:55.

Q And says you left at approximately when?

A 11:05.

Q Okay, thank you. You can take that one down. When you got to the Mansion, you check in with the security guy, what happens next?

A I was escorted into the Mansion by the First Lady's Chief of Staff.

Q Who is that?

A At the time it was Mary-Shea Sutherland.

Q What happened after you got escorted in?

A I was seated in the foyer of the Mansion and Mr. Williams was there.

Q Kind of a waiting area?

A Yes.

Q Did you have any discussion or conversation with Mr. Williams while you were waiting?

A Yes.

Q Tell us briefly what you all talked about.

A My memory recalls him talking about his wife, about the product which I would later learn that he was there to talk about, Anatabloc, and the success in treating a thyroid condition of hers.

Q Okay. How long would you say you were sitting there with Mr. Williams chatting?

A Ten minutes roughly.

Q What happened next?

A At that time, the First Lady's Chief of Staff came and took us down to the office, the First Lady's office that was in the Mansion for the meeting.

Q Okay. When you got there, who participated in the meeting besides yourself?

A I recall the First Lady and Mr. Williams being there as well.

Q Just the three of you?

A That's my recollection.

Q All right. Now, we are going to get to details in a minute. But before we do that, could you tell us just generally what the meeting was about?

A The meeting was about Mr. Williams talking about the product, Anatabloc, that he was involved in from a company standpoint, talking about the successes and the trials that were going on, scientific trials, if you will.

Q How long would you say the meeting lasted all told?

A I would imagine we were together maybe an hour.

* * *

[Page 1505]

Q Did you send this one?

A I did.

MR. HARBACH: The government offers Government's 193.

THE COURT: It will be admitted.

BY MR. HARBACH:

Q We have blown up your e-mail on this one. Who are you writing to?

A I'm writing to Mr. Williams.

Q On what date?

A Date, August 1st, 2011.

Q At what time?

A 12:40 p.m.

Q Same day of the meeting?

A Yes, sir.

Q little bit later that afternoon?

A Uh-huh.

Q I'm sorry, as made obvious by the subject line. Let's go on. The first sentence says: "I enjoyed meeting with you this morning and look forward to receiving the information from you regarding the clinical trials and other advancements of Anatabloc."

My first question is, do you recall where you got the idea that information on clinical trials was forthcoming?

A Other than talking about them in the meeting, no.

Q So it would be from Mr. Williams?

A Yes.

Q Okay. Then a little bit further down the e-mail, you say: "As you know, it is necessary for us to make policy recommendations and decisions off of sound data. I am grateful that you are making strides to validate the incredible anecdotes and stories that result from your work. At times I found myself drifting to excitement thinking about my father, who suffers greatly from Ankylosing Spondylitis (severe form of arthritis.)"

Now, earlier today we saw an e-mail where you mentioned Tic-Tac Man and you were joking a little bit with your staff members and your colleagues about this meeting. My question for you is, did the meeting you had with Mr. Williams change your view about the product?

A No, sir.

Q Was it true that you found yourself drifting to excitement thinking about your father during the meeting?

A Can you reask that question?

Q I was just asking was it true that in fact you found yourself drifting to excitement thinking about your father during the meeting with Mr. Williams?

A Sure.

Q Was that related to the product?

A I would say the anecdotes.

Q Okay. Then toward the end, you say: "It thrills me to think that within his lifetime there is a possible method to alleviating his significant pain without costly side effects."

Did you believe that? Did you believe that Anatabloc might actually do that?

A I don't think that's a fair statement.

Q Okay. Generally, just tell us why you wrote this e-mail, ma'am.

A Protocol in the office.

Q Being polite?

A Being polite.

Q Okay. Now, you close the e-mail by saying: "I will continue to work alongside of the First Lady as we identify how best to move forward."

When you wrote this e-mail, what did you understand your job to be going forward as far as this issue was concerned?

A Nothing at the time of the written e-mail.

Q Okay. And we can just see very briefly how you close the e-mail on Page 2. You just say, "Thank you for your time today."

You can take the exhibit down. Thank you, Mr. Starnes.

Following this e-mail, ma'am, did you receive any further direction, to your recollection, from any of Mr. McDonnell, Ms. McDonnell, or Dr. Hazel about this Anatabloc issue?

A No, sir.

Q Last question: Would you have attended the meeting with Mr. Williams if the Governor had not requested it?

A Can you ask that another way?

Q I can try. If you had not learned via that e-mail that the Governor had requested that a member of Dr. Hazel's staff attend the meeting, would you have attended it?

A No.

MR. HARBACH: Nothing further for this witness, Your Honor. Thank you.

THE COURT: Cross?

CROSS-EXAMINATION

BY MR. ASBILL.

* * *

[Page 1516]

Q All right. You can take that down. Let me talk to you a little bit about your last correspondence or your e-mail with Mr. Williams at the end after the meeting. That's, I believe, Government Exhibit 193. Would you put that up, please? But wait. Before I

ask you a question about this, I am going to ask you about it, whatever Mr. Williams told you, did you ever verify or figure out or try to corroborate whether any of the things that he told you were true?

A No, sir.

Q You just basically wrote down what he said and that's it.

A Yes, sir.

Q Never tried to go back and double-check or corroborate or figure out whether what he said was true or false or misleading in any way; is that correct?

A No.

Q All right. So how long after the meeting, roughly, do you write this e-mail back to Mr. Williams?

A I believe the time stamp would indicate about an hour and 40 minutes later.

Q Okay. And you left, so you left basically the meeting and you go back to your office and an hour and 40 minutes later you write this e-mail; is that correct?

A That's what the time would indicate, yes, sir.

Q In between the time you leave the meeting and you go back to your office to write this e-mail, do you touch base with anybody else in your office about how if at all you are going to respond to Mr. Williams?

A No, sir.

Q So you make this decision on your own an hour and 40 minutes later to write this e-mail to Mr. Williams, correct?

A Yes, sir.

Q And you had no doubt in your mind that you were authorized or empowered to make the decision to write this e-mail and whatever you say in it. Is that correct?

A That's correct.

Q So you clearly had that authority?

A Yes, sir.

Q You were empowered to do that, were you not?

A Yes, sir.

Q All right. So you were empowered to make your own decision about what to do going forward if at all here with Mr. Williams, correct?

A That would be fair.

Q All right. And would I be accurate in characterizing this e-mail to Mr. Williams as basically a blow-off e-mail?

A That's probably fair, yes.

Q "No" with a smile?

A Yes.

Q When you say, "I will continue to work alongside of the First Lady as we identify how best to move forward," did you have any plans to move forward on anything?

A I personally did not.

Q Okay. Do you know whether anyone else in your office had any plans to move forward?

A No.

Q In fact, did anyone in your office move forward with anything?

A No.

Q Now, with respect, you told us a little bit about the back channel story here before you went to the meeting and you are talking about Mr. Williams as the Tic-Tac Man. That was sort of office scuttlebutt, gossip, whatever?

A Yes.

Q And that had been based on a prior meeting between your boss, Dr. Hazel, and Mr. Williams that you heard about, essentially?

A Yes, sir.

Q Is that correct? Okay, going over to the meeting, I mean, you had a sense of Mr. Williams before you even came to the meeting?

A A sense, yes.

Q And in the meeting, were you impressed by him particularly?

A I would say no, not impressed.

Q Okay. And Dr. Hazel had previously asked you to attend a lot of meetings of this type; is that fair to say?

A Yes.

Q Whether or not they occurred at the Mansion or at some other location?

A Correct.

Q All right. So if somebody had an idea that related to health, was it your understanding that was the job of Dr. Hazel's office, to listen to these folks and hear them out?

A One of the functions, yes.

Q I don't know whether you can put a number on it, but maybe 1 out of 10, 1 out of a hundred folks

might have a really good idea, others may not be so great, but it is the job of your office to listen to them, evaluate them, look at the science, and make a decision; is that right?

A That's fair, yes.

Q And with respect to that process of hearing people out, listening to what they have to say, make a decision, that's something that you all did independently, correct?

A Yes.

Q And in your experience, did my client, Governor McDonnell, ever interfere with that decision-making process by you or your colleagues in your office?

A Interfere, no.

Q Okay. And if he thought that you were—you were entitled, you all were entitled to make those kind of decisions in your subject matter area; is that right?

A Yes.

Q Okay. Now, with respect to afterwards, was it at the meeting or afterwards that Mr. Williams left some samples of Anatabloc?

A Which meeting are you referencing?

Q Did he leave any or give any to you or send any to you after the meeting or did you already have some samples from Mr. Williams' meeting with Dr. Hazel that had occurred earlier?

A Both.

Q Both?

A Yes, sir.

Q So he sent you some Anatabloc after the meeting?

A He did.

Q Okay. And with respect to folks sending you sample products, was that unusual?

A No.

Q It had occurred with other people on other types of—on other occasions?

A Sure.

Q Okay. Did you view this meeting as a big deal or just doing your job?

A Just doing my job.

Q Now, go back to the e-mail, please, where it talks about the desires of the Governor and the First Lady. Could you blow that up, please, where it talks about that?

A It is at the top, sir.

Q I'm sorry, I missed it. Okay. All right, in this e-mail, you write to Matt Cobb and Keith Hare, correct?

A That's correct.

Q Those are folks that are deputies to Dr. Hazel?

A Yes, sir.

Q You write, "On a more serious note I am not planning to commit to anything but will just stick with what we will to do what we can to carry out the desires of the Governor and the First Lady." Right?

A Yes, sir.

Q This was an e-mail that was sent before the meeting; is that right?

A Yes, it appears that way.

Q So they asked initially, Matt Cobb, Dr. Hazel asked Matt Cobb to go, he is busy, he can't go, he asked you to go, and before you go you send this e-mail back, right?

A Yes.

Q So when you talk about the, quote, desires of the Governor, what you meant by that was to go to the meeting. That's what they desired. Right?

A At the time that would be fair, yes.

Q All right. Nothing more, just go to the meeting is what my client desired from your understanding.

A At the time of the e-mail, yes.

* * *

[Page1528]

BY MR. HAUSS:

Q And you've been asked about this a couple of times, but you—going into this meeting, you had decided you were not going to commit to anything with Mr. Williams, correct?

A That's correct.

Q And then where you say "the desires of the Governor and the First Lady," did you speak with Ms. McDonnell prior to the meeting at all?

A No.

Q And you testified that between getting the e-mail asking you to attend and the meeting itself, you did not speak to any of your colleagues, is that correct, about the meeting?

A Other than the e-mails, no.

Q And, in fact, prior to this meeting, you had never spoken with Ms. McDonnell about Jonnie Williams; is that right?

A That's correct.

Q You had never spoken to her about Star Scientific?

A Correct.

Q Okay. So going into this meeting, you had no idea what Ms. McDonnell's desires were, if any, with respect to Mr. Williams or Star Scientific. Is that fair?

A That's fair.

Q You did know at the time of the meeting, is it fair to say, that Ms. McDonnell was generally interested in nutraceuticals?

A That's fair.

Q And you knew that as First Lady, she had initiatives in health and nutraceuticals. Is that fair?

A Initiatives in, no.

Q Okay. But you knew she was interested in nutraceuticals?

A Yes.

Q And during the meeting, did it appear to you that Ms. McDonnell was attentive and was listening?

A Sure.

Q But you testified that your best recollection is she basically didn't say anything during the meeting?

A That's what I recall.

Q So after this meeting that lasted about an hour where Ms. McDonnell didn't say anything, you still

had no idea what her desires, if any, were with respect to Mr. Williams and Star. Is that fair?

A Shy of attending the meeting, no.

Q And then you indicated just now with Mr. Asbill that there was no ask during the meeting; is that correct?

A Correct.

Q And so since there was no ask, is it fair to say that by the end of the meeting, you still did not commit to anything with Mr. Williams?

A That's accurate.

MR. HAUSS: And if we could have Government Exhibit 193, which is in evidence. The bottom e-mail.

BY MR. HAUSS:

Q And down here at the bottom of this e-mail where you say, "I will continue to work alongside the First Lady as we identify how best to move forward," prior to this meeting, had you ever worked with the First Lady?

A No.

Q After this meeting, did you ever work with the First Lady?

A No.

Q You basically said that—you testified earlier this is basically a polite blow-off?

A Yes.

Q Did Ms. McDonnell ever follow up with you in any way after this meeting?

A She did not.

Q Did you ever follow up with her?

A I did not.

* * *

[Page 1592]

JASEN EIGE,

called as a witness by and on behalf of the government, having been first duly sworn by the Clerk, was examined and testified as follows:

* * *

[Page 1665]

BY MR. HARBACH:

Q Do you recognize this to be an e-mail exchange between you and Governor McDonnell about this Anatabloc, slash, VCU issue?

A Yes.

MR. HARBACH: Your Honor, the government offers Government's 320.

THE COURT: It will be admitted.

BY MR. HARBACH:

Q Publishing 320 to the jury, Mr. Eige, is this the first exchange you recall between yourself and the Governor himself about this issue of studies at either of these universities?

A Yes.

Q Okay. And what's the date and time that Mr. McDonnell e-mails you?

A February 17th, 2012, 12:02 a.m.

Q And what does he say to you, sir?

A "Please see me about Anatabloc issues at VCU and UVA. Thanks."

Q And you reply how, four minutes later?

A "Will do. We need to be careful with this issue."

Q Okay. First question is a moment ago you said you weren't even sure whether the Governor himself was interested in this issue when you got the e-mails from Maureen McDonnell. Now, this is the governor himself e-mailing you about this.

Did that change your view at all about whether it was appropriate for the Governor's Office to be involved in this?

A No. I mean, frankly, I thought the First Lady was now pushing on the Governor a little bit to send this, you know, reach out to me on this.

Q Okay. Did she ever tell you that that happened?

A No.

Q Did Mr. McDonnell ever tell you that she was pushing him to send this?

A No.

Q Why, in your view, did "we need to be careful with this issue"?

A Well, as I mentioned before, this was just not something the Governor's Office should be involved with. This wasn't an appropriate use of our time or resources. It wasn't something that we really had, frankly, the authority to do, and it just was not a matter that—that we should be involved with as far as trying to broker some type of an understanding or compliance with the universities who had received

this grant money and a company. That was a matter between them and not something that I felt like was an appropriate use of our time or our—our authority.

Q Did you meet with Mr. McDonnell following this e-mail exchange?

A I was planning to. I have every reason to believe I popped in the next morning and kind of explained that it was taken care of, we didn't need to bother with this. But today, sitting here, I can't say that I remember specifically having a particular conversation or meeting.

Q What were you planning on telling him?

A Just that, again, this was something that really needed to be worked out between the company and the universities, that we didn't need to get involved with it.

I believe by that point in time, I had called Jerry Kilgore, and I think had—had changed—you know, hoped that that would change the expectations, and so that request of us would have been withdrawn by Star.

Q Did you—do you recall whether—one way or the other, whether you shared with Mr. McDonnell that you called Mr. Kilgore?

A I don't recall at this point.

Q Do you recall anything about Mr. McDonnell's reaction during this conversation that you think took place?

A I don't. The only—you know, I have a recollection that he never followed back up with me or never pushed back or never directed me to actually

go forward and try to make something happen with the universities.

Q Okay. Let me ask you the same question with respect to Ms. McDonnell. Do you recall any follow-up or additional requests or pushback from her?

A I don't have any recollection of her doing that either.

* * *

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA,
Plaintiff;

v.

Criminal Action
3:14CR12

ROBERT F McDONNELL and
MAUREEN G. McDONNELL,
Defendants.

August 6, 2014
Richmond, Virginia
9:35 a.m.

JURY TRIAL—VOLUME VIII

BEFORE: HONORABLE JAMES R. SPENCER
United States District Judge

APPEARANCES: MICHAEL S. DRY, ESQ.
DAVID V HARBACH, II, ESQ.
JESSICA D. ABER, ESQ.
RYAN S. FAULCONER, ESQ.
Counsel for Government;

JOHN L. BROWNLEE, ESQ.
HENRY W ASBILL, ESQ.
JAMES M. BURNHAM, ESQ.

DANIEL I. SMALL, ESQ.
CHRISTOPHER M.
IAQUINTO, ESQ.
Counsel for Robert F
McDonnell;

WILLIAM A. BURCK, ESQ.
HEATHER H. MARTIN, ESQ.
STEPHEN M. HAUSS, ESQ.
Counsel for Maureen G.
McDonnell.

JEFFREY B. KULL
OFFICIAL COURT REPORTER

* * *

[Page 1777]

DR. JOHN LAZO,

called as a witness by and on behalf of the government, having been first duly sworn by the Clerk, was examined and testified as follows

* * *

[Page 1792]

Q Now, at some point during the presentations and the discussions, did Mr. McDonnell arrive?

A Yes. He was not there in the beginning. He arrived sometime during the luncheon. I'm not exactly sure when, but it was at least halfway through, maybe a little bit later than that.

Q After he arrived, was at least some of what Mr. Williams was talking about after Mr. McDonnell arrived?

A I think so. But again, it was three years ago, so I'm not really positive if he was there during the formal presentation or afterwards.

Q Now, when Mr. McDonnell arrived, what happened?

A I actually don't know if we stood up or we remained seated. But he did sit down to join us.

Q Do you remember, you said Ms. McDonnell was at the northern end of the table. Do you remember where Mr. McDonnell sat?

A He sat at the southernmost part of the table.

Q And who was sitting next to him, do you recall?

A Mr. Williams was to his right.

Q Now, when Mr. McDonnell came in and sat down, did he appear to be paying attention to what was being said?

A Yes, I think so.

Q And during all of the conversation and exchanges, did anyone say anything about the relationship of the event to the product being rolled out into stores?

A So I'm not quite sure who mentioned that, but I know that when I left, I recognized that this was the day that the product was being launched. So it was mentioned there, but I'm just not sure who said it, whether it was Mr. Williams, whether it was somebody else at the table. But I do remember it being mentioned.

Q Now, when the researchers were talking, did you say earlier that they were talking some about studies of Anatabloc?

A Yes.

Q Now, at the end, did Mr. McDonnell engage with the people who were present?

A So I'm not sure it was at the very end, but somewhere toward the end of the luncheon he did ask us some questions as a group about our thoughts on Anatabloc.

Q What do you recall him talking about?

A So I think the one question he asked us was, did we think that there was some scientific validity to the conversation and some of the pre-clinical studies that were discussed, or at least alluded to. He also, I think, asked us whether or not there was any reason to explore this further; would it help to have

additional information. And also, he asked us about could this be something good for the Commonwealth, particularly as it relates to economy or job creation.

Q And do you recall there being discussion about the relationship of the product Anatabloc to tobacco?

A Oh, yes. As I mentioned earlier, Mr. Williams had the tobacco stalk there. And I think the point he was trying to make was that this anatabine, which is the major active component in Anatabloc, is a minor alkaloid that's found in tobacco. By minor, I mean it is a small fraction of the alkaloids, nicotine being the largest. And that this, if indeed this compound was useful, then we would be able to say that something good came out of tobacco. I think that was the point that was being made.

Q Based on what Mr. McDonnell said, did it seem like he knew Mr. Williams?

A You know, I don't know that I can say that. I mean, I don't know whether he knew him or didn't know him based on my observations at the luncheon.

Q Let me ask it this way: When Mr. McDonnell walked in, did he say, "What's going on? I don't understand what this is."

A No, he walked in and was cheerful and greeted people. But I thought he was aware of what was going on.

Q And based on the tenor of the conversation, was it generally a positive conversation about Anatabloc or was it all negative about Anatabloc?

A Well, I don't think the tenor was negative. I think it was, the conversation of Mr. Williams was, I would characterize as positive. I think the

Governor's position was more of an interrogative type of a sort of questioning rather than "Isn't this great?" or "Isn't it this awful?" if that's what you are asking me.

Q Did the Governor say anything negative about the product?

A No, he didn't say anything negative about the product.

Q Now, I'd like to show you what's been marked as Exhibit 232 for identification. Dr. Lazo, do you recognize this document?

A Yes, I do.

Q What is it?

A It is a check.

Q Is this a check that you received at the end of this event?

A It is.

MR. FAULCONER: I would offer Exhibit 232 into evidence.

THE COURT: It will be admitted.

THE WITNESS: It is a photocopy of the check.

BY MR. FAULCONER:

Q Got it. Is this made out to University of Virginia Medical School?

A Yes, it is.

* * *

[Page 1810]

Q Okay. And I think you have testified you have never spoken to Bob McDonnell again; is that correct?

A No.

Q I believe you spoke very briefly about what you called research, the principles about the integrity of research; is that correct? You mentioned that in your prior testimony?

A I think the question was asked of me about transparency, and I said that, you know, one of the core principles, I think all of us at research institutions need to maintain is to be sure that we are transparent. As you are saying, obviously, I think there has to be integrity with respect to what we do.

Q And nothing Bob McDonnell said, in your opinion, would violate any of those research principles, correct?

MR. FAULCONER: Objection, Your Honor.

THE COURT: No, he can answer that. Go ahead.

THE WITNESS: Could you repeat the question?

BY MR. BROWNLEE:

Q Nothing Bob McDonnell said would have violated any of those research principles, correct?

A No.

Q Okay.

* * *

[Page 2032]

SARAH SCARBROUGH,

called as a witness by and on behalf of the government, having been first duly sworn by the Clerk, was examined and testified as follows:

* * *

BY MR. BURCK:

[Page 2121]

Q And when Governor McDonnell introduced Dr. Ladenson, did he say, "This is Dr. Ladenson. Please, everyone, speak to him about Anatabloc. Jonnie Williams is in the crowd. He's his friend"?

Did he say anything like that?

A No.

Q Did he introduce him as Dr. Ladenson from Johns Hopkins, one of the world's greatest medical universities?

A Yes.

* * *

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA,
Plaintiff;

v.

Criminal Action
3:14CR12

ROBERT F. McDONNELL and
MAUREEN G. McDONNELL,
Defendants.

August 8, 2014
Richmond, Virginia
9:45 a.m.
JURY TRIAL—VOLUME X

BEFORE: HONORABLE JAMES R. SPENCER
United States District Judge

APPEARANCES: MICHAEL S. DRY, ESQ.
DAVID V HARBACH, II, ESQ.
JESSICA D. ABER, ESQ.
RYAN S. FAULCONER, ESQ.
Counsel for Government;

JOHN L. BROWNLEE, ESQ.
HENRY W ASBILL, ESQ.

JAMES M. BURNHAM, ESQ.
DANIEL I. SMALL, ESQ.
CHRISTOPHER M.
IAQUINTO, ESQ.
OWEN T. CONROY, ESQ.
Counsel for Robert F
McDonnell;
WILLIAM A. BURCK, ESQ.
HEATHER H. MARTIN, ESQ.
STEPHEN M. HAUSS, ESQ.
DANIEL KOFFMANN, ESQ.
Counsel for Maureen G.
McDonnell.

JEFFREY B. KULL
OFFICIAL COURT REPORTER

* * *

[Page 2650]

SARA WILSON,

called as a witness by and on behalf of the government, having been first duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ABER:

Q Good afternoon, Ms. Wilson.

A Good afternoon.

Q Please state your name, and spell your first and last for the record.

A Sara Redding Wilson. And it's S-A-R-A, W-I-L-S-O-N.

Q What is your current title?

A I am the Virginia Department of Human Resource Management Director.

Q Tell the jury, please, what that involves.

A I'm head of human resources. That—one of the things I manage is healthcare, EEO, any type of fairness and equity type of issues, human resource policy for the state. Any kinds of things like that that relate to people. Worker's compensation. Various human resource issues.

Q Do you work within the office of a Cabinet secretary?

A I do. I work within the Office of the Secretary of Administration.

Q How long have you had this job?

A I've had this job since April 1998. This is my fifth governor.

Q So does that mean you worked in the administration of Governor Robert McDonnell?

A Yes, it does.

Q And during that administration, to which Cabinet secretary did you report?

A Secretary of Administration.

Q And what was her name?

A Lisa Hicks-Thomas.

Q Is it fair to say that you oversee, in part of your many hats, the health plan for the employees of the Commonwealth of Virginia?

A Yes, ma'am.

Q Now, are you familiar with a company called Star Scientific?

A I am.

Q Did you have a meeting with someone from Star Scientific on February 29th, 2012?

A I did.

Q And who was that?

A David Dean.

Q And did he make an appointment or did he just sort of swing by?

A He was a cold call. Just walked in, asked if I had time to meet with him, and I did. So I met with him.

Q Is it common for folks to just knock on your door, swing by?

A Has it been done? Yes. Is it the most common? No. But it's not unheard of.

Q Now, at that time—

A And it was his lucky day. He didn't have to wait.

Q At that time, what did you understand that David Dean did for Star Scientific?

A He was involved in sales and marketing for Star Scientific.

Q And, in essence, what did David Dean want from you in that meeting? What was his ask?

A He walked into the meeting. I said, "What can I do for you? What is it you want?"

And he said, "I would like Anatabloc to be covered by the employee health plan."

And I said, "Well what is this? Is this a drug? Is it covered by the FDA? What is it?"

And he said, "Oh, no. No. No. This is a dietary supplement."

And I said, "Well, that's going to make this meeting really short because we don't cover dietary supplements in the state health plan."

Q Did you ask Mr. Dean about studies of Anatabloc, scientific studies?

A Oh, yes. Yes. Because he's a salesman. He's a good salesman. And he talked about who was taking it and all the people interested in it. And I wanted to see studies. I wanted to see the scientific research behind this. Even though we didn't cover it, I was very interested in results. And we have a lot of employees that have—that need things that would be

anti-inflammatory. So I looked for detailed scientific information.

Q Did he say anything about having state employees participate in a pilot research study?

A At some point in time, I've talked to him several times, he may have mentioned it. But employees can participate in any kind of study. There's that 1 800 on the billboard, "If you have these kind of symptoms, call." They are free to participate, but it's not anything that we would sponsor.

Q Okay. So after you sent Mr. Dean on his way, did you see him later that evening?

A Yes, I did.

Q And where did that happen?

A At the Executive Mansion.

Q For what kind of event at the Executive Mansion?

A I believe it was called Health Leaders meeting or Leaders in Healthcare. Something along that line.

Q Did you also briefly meet a gentleman named Jonnie Williams at that reception?

A Briefly.

Q Okay. Now, moving forward in time, almost a couple weeks, were you present at a meeting with Mr. McDonnell on March 21st, 2012?

A 21st. Yes. Yes, ma'am.

Q On or about?

A Yes. 21st.

Q Who else was at this meeting?

A Lisa Hicks-Thomas, Martin Kent. And others may have come and gone, but those two were there for the duration.

Q And Lisa Hicks-Thomas was your boss at the time, right?

A Yes, ma'am.

Q Where did the meeting take place?

A Governor's Office.

Q So the Governor was present?

A The Governor was present.

Q Okay. What was the purpose of this particular meeting?

A We were talking about healthcare.

Q Was there any particular aspect that related to your job and the Virginia healthcare plan for employees?

A Yes. He was very interested in implementing a consumer-driven health plan, and we were always giving him updates on that particular item. Of course, I always try to get in employee compensation and other issues when I have an audience with the Governor, but the primary meeting was for healthcare.

Q In a nutshell, can you tell the jury what a consumer-driven healthcare plan is?

A A consumer-driven healthcare plan is a plan that we've put in place to try and get employees to really know their numbers and be much more engaged in their health, taking care of themselves. And we give them tools so that they can understand the quality and cost from their providers where you

can go look it up on-line to see what certain procedures cost or what providers charge. So they have the tools.

And then the big difference from a regular plan is that they pay more out of pocket. But to offset that, the employer gives them cash. So that we give them cash for them and for their spouse, and then they can earn additional funds, what we call do rights. Like if you go to the doctors, you can get a reward. If you get your flu shot, you can get a reward. So would get additional rewards to put into your account. And anything you don't spend rolls over for your own account for the next year and keeps rolling over and over and over. So it's your money to spend on healthcare.

So the concept is is that if you're an employee spending your money, you're going to be a good shopper. And that's what we're looking for the consumer to be a good shopper. Because if they are, then they win and so does the state plan, which also means all other state employees would win too because hopefully the cost would drop.

Q Now, based on your conversations with Mr. McDonnell during the administration, would you say that he was a proponent of this consumer-driven plan?

A Oh, he was very much in—very, very interested in the consumer-driven plan. Yes.

Q Now, at this meeting on March 21st, did Mr. McDonnell make any reference to Anatabloc?

A At the end of the meeting, he did.

Q Okay. Tell the jury what exactly happened, to the best of your—

A He was mentioning—we were talking about all these issues, and he pulled out a bottle, you know, one of those small bottles, of Anatabloc and talked about how much it had helped him and his wife.

Q Did you try to respond to him?

A I did try to respond to tell him that I had already met with these people. But there was a lot of conversation, and so I just didn't finish the—I didn't finish my thought with him to tell him I had already met with these people.

* * *

[Page 2666]

Q Okay. And I think you testified that at some point at the end of the meeting Mr. McDonnell pulled out a bottle of Anatabloc and talked about the fact that he took it and that it had helped him; is that—

A That's correct.

Q And you testified that you were talking about numbers. Were those numbers, like cholesterol numbers and blood numbers? Things that people refer to in their own health?

A Yes. We were trying to get employees—one of the things about a consumer-driven health plan is to get employees to know their numbers. Whether it's their blood pressure, their BMI, their—

Q What is BMI, for the record?

A We have—it's—it is the measure, really, of whether you're overweight or not.

Q Okay

A And so that's—we are really interested in that because if you are, it has a collateral impact on a lot of other diseases—

Q Okay.

A — which raises the cost of the healthcare. So we're trying to get everybody to do right and do all the things to help them be healthier. And if they're healthier, then they're at work more, and they are—we get the work done, and they are better and healthier.

Q All right. Do you remember, if you recall, one of the numbers that was discussed was something called C-reactive protein? Do you recall that?

A I don't recall that, but it could easily have been discussed. But I am familiar with C-reactive protein.

Q All right. And is that a number or a marker—

A That's an inflammatory piece to—that goes with that, that measures that.

Q All right. And that has some indication of the status of your heart. Is that fair?

A Yes.

Q Okay. Now, I believe you stated before that it was your view that when he pulled this out, that it was like someone would pull out and say, "I like an Advil gel cap over Tylenol"; is that correct?

A He pulled it out. I didn't know why he pulled it out. I mean, for me, it could say—I would say, "I like Advil gel caps over Aleve." I had no idea why he pulled it out because there was no ask. There was nothing there. He did pull it out of his pocket, though, and talk about it. It was personal.

Q Okay Now, Ms. Aber talked with you about—after the meeting you had this conversation with Ms. Hicks—Secretary Hicks-Thomas; is that correct?

A Yes.

Q And there was some confusion between the two as to whether or not—exactly what Mr. McDonnell had said in the meeting?

A Well, I don't know if there was—I did not hear him ask for anything, and she thought that—it was my—my recollection that she said, "He wants us to contact them." And that wasn't my recollection at all because he didn't say that.

Q Okay.

A And I had already met with these people.

Q Okay. And so then you went and—

A Googled them.

Q — you looked it up on—on Google?

A We Googled them.

Q And Googled them. Okay. Fair enough. Now, you did have on your calendar, did you not, just scheduled for the next day, this meeting with Dean that you just talked about?

A That was just a follow-up meeting from our first meeting.

Q Okay. But that didn't have anything to do with Bob McDonnell?

A No.

Q Okay. All right. And after that, were there ever any other follow-up or any additional meetings or anything about Anatabloc or—or Star Scientific with you?

A The only issue that I—when we went down, as we walked down to Secretary Lisa Hicks-Thomas' office, I explained the history I had had with learning about Star Scientific, and I explained to her that David Dean had been to see me, that I told him it was not covered, that I—I did offer an employee discount if they wanted to offer that, and I had not heard back.

We Googled them, and I said, "I'll keep you posted if I hear anything more about it. And to date, we've not even heard back on the discount for state employees. So we've really not talked about it since.

Q Okay.

A I mean, other than related to something like that. But no. Never followed up.

* * *

[Page 2672]

LISA HICKS-THOMAS,

called as a witness by and on behalf of the government, having been first duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ABER:

Q Good afternoon.

A Good afternoon.

Q Please state your name and spell it for the record.

A It is Lisa Hicks-Thomas, L-I-S-A, H-I-C-K-S T-H-O-M-A-S.

Q Did you previously serve in the Administration of Governor Robert McDonnell?

A Yes, I did.

Q In what capacity?

A I was the Secretary of Administration.

Q Can you tell the jury briefly what a Secretary of Administration does?

A Sure. The Secretary of Administration is a member of the Governor's Cabinet, tasked with basically the responsibility of running the back office of state government. And I had a number of agencies that reported to me, including the Department of Human Resource Management, the Department of General Services, the State Board of Elections, the State Compensation Board, the Department of Employee Dispute Resolution, the Department of Minority Business Enterprise, and the State Compensation Board. I think I said that.

Q Did a woman named Sara Wilson report to you?

A Yes, she did. She was the head of the Department of Human Resource Management.

Q And to whom did you report?

A I reported to the Governor.

Q So fair to say you are part of or were part of the Cabinet?

A Yes.

Q Could the Governor fire you?

A Yes.

Q Just to be clear, you don't work in state government anymore, right?

A No.

Q All right. In your capacity as Secretary of Administration, did you have a hand in administering the health plan for the employees of the Commonwealth of Virginia?

A Yes, I did. As I said, the workforce, state employees, about 105,000 employees, were under our state health plan, and that fell under the purview of the Department of Human Resource Management and then ultimately up to me as the Secretary.

Q Who administers the health plan for Virginia state employees?

A The company, you mean?

Q I mean—

A We are self-insured. The state is self-insured, but we have a third-party administrator and that is Anthem.

Q Approximately how much money during your tenure did the State of Virginia spend on the healthcare plan for state employees? Ballpark?

A Definitely in the millions of dollars.

Q Now, did the state employee health plan authorize certain drugs that could be used and not used by state employees?

A Yes.

Q And who made the decision about what drugs would be covered and which ones would not?

A Well, it was a joint decision. I mean, the Department of Human Resource Management and the folks that were directly assigned to look at the healthcare plan, they would do research over the year

as well as with our, we had different advisors, different companies that worked with us, like Aon, for example, and they would make calculations as to what was more effective or what was, you know, not being utilized or what would be, you know, less expensive, for example, and so they would make recommendations to Sara. And then Sara would bring those to me and we would look over the plan and then we would sit down ultimately during the budget cycle when we were going over the state budget, we would sit down with the Governor and folks from the Department of Planning and Budget and make those decisions together.

Q Did you periodically have meetings with the Governor about the state employee healthcare plan?

A Yes.

Q Did you have such a meeting back in the spring of 2012?

A Yes.

Q Who was present at the spring meeting?

A I was present, Sara Wilson was present, I believe Martin Kent was there, and the Governor was there.

Q And where did the meeting take place?

A I believe that meeting took place in the Governor's office.

Q In general, what was the topic of that particular meeting?

A We were talking about the state employee health plan.

Q In very short terms, how would you describe a consumer-driven health plan?

A We were talking about implementing a consumer-driven health plan, which just to be brief, it is really empowering state employees or whoever is covered by the plan to have more information about their healthcare costs, and it is a way to drive down healthcare costs for the Commonwealth of Virginia and ultimately for the taxpayers.

Q During this particular meeting, did Mr. McDonnell make any reference to Anatabloc?

A Yes. At some point in the meeting, he reached in his pocket and pulled out, he showed us the pills and he said that he had been taking them and that they were working well for him, and that he thought it would be good for like state employees, and then he said that, he asked us if we would meet with them, meet with the people.

Q In that meeting, did you respond?

A I'm sure we said, "Sure." I can't remember. I really don't remember word for word what I said. But that was pretty much the gist of it.

Q And after the meeting finished, what did you do?

A After the meeting finished, Sara and I left the office, and I'm not sure if she told me at that point that she had already met with the folks, but we went down to my office and we went and looked it up on the computer to see what it was.

MS. ABER: If I could have one moment, please, Your Honor.

THE COURT: Sure.

(Counsel conferring with co-counsel.)

MS. ABER: Thank you, Your Honor. I have no further questions.

THE COURT: Cross?

CROSS-EXAMINATION

BY MR. BROWNLEE:

* * *

[Page 2679]

Q I think you testified at some point during this, he pulled out an Anatabloc pill or something and said he took it and thought it helped him; is that correct?

A That's correct.

Q Okay. And then there was some other conversation, and I think you testified that you can't remember word for word, but at some point after the meeting, you and Ms. Wilson had a discussion about what he actually said, and whether or not he wanted you all to meet with him; is that right? Do you remember that?

A I don't recall that. I know at some point after the meeting, Sara and I left and she said that she had already met with the people, the Anatabloc folks. And then we walked down to my office and looked it up on the Internet.

Q Okay. You looked up the company?

A Right. We looked up Anatabloc.

Q Okay. Now, if it was after that—was there any other follow-up?

A No.

Q Governor McDonnell never came back to you and said "Did you meet with them? Did you take care of that?"
A Never.

* * *

[Page 2680]

Q Governor McDonnell never came back to you and said "Did you meet with them? Did you take care of that?"
A Never.
Q Okay. Now, Ms. Aber asked you about whether or not the Governor could fire you. I just want to be clear, he didn't fire you, right?
A No, he did not.
Q You stayed until the very last day; is that right?
A Until the very last day.
Q Okay. Fair to say that if you had the opportunity you would go work for him again?

MS. ABER: Objection.

THE COURT: She can answer it if she wants.

THE WITNESS: Well, yes. I guess if he was the Governor again, I guess I would work for him again. Yes. Although I like where I work now, I will say.

MR. BROWNLEE: Thank you very much.

THE COURT: Anything?

MR. KOFFMANN: No questions, Your Honor.

THE COURT: Anything else based on that?

MS. ABER: No, Your Honor, thank you.

THE COURT: You may stand down.

(Witness stood aside.)

* * *

[Page 2748]

SHARON KRUEGER,

called as a witness by and on behalf of the government, having been first duly sworn by the Clerk, was examined and testified as follows:

* * *

[Page 2769]

BY MR. FAULCONER:

Q Now, as you sort of did your due diligence and you were participating in these calls with Dr. Lazo and Star and Rock Creek, did you also brief one of the individuals I think we've referenced named Tom Skalak?

A only one.

Q And does Mr. Skalak, to your knowledge, interact with government officials in his job?

A Yes, he does.

Q Now, before you briefed Mr. Skalak, did you put together a list of pros and cons in your—as part of your due diligence?

A So that was a document I created just for myself. When you—when—personally, when I'm wrestling with making some decisions, it's easier if I write down pros and cons. So it was a document I created for myself, to be seen by no one except myself. And yes, I did.

MR. FAULCONER: I'd like to show the witness what's been marked for identification as Exhibit 267

BY MR. FAULCONER:

Q And is that the pros/cons list that you created?

A Yes, it is.

MR. FAULCONER: Your Honor, we'd offer Exhibit 267 into evidence.

THE COURT: It will be admitted.

BY MR. FAULCONER:

Q All right. Now, we won't be long on this, but could you just read for us the first thing that's listed in the "Pro" column there?

A "Perception to Governor that UVA would like to work with local companies to support future economic development."

MR. FAULCONER: And if we could scroll over to the right.

BY MR. FAULCONER:

Q What is the first thing written in the "Cons" column?

A "Political pressure from Governor and impact on future UVA requests from the Governor."

Q All right.

MR. FAULCONER: We can go ahead and take that down.

BY MR. FAULCONER:

Q Now, we've talked a lot about the process that unfolded. In the end, did the UVA researchers end up making any applications to the Tobacco Commission?

A No, they did not.

Q At the time of your various deliberations and due diligence and these conversations, did you have any knowledge of any payments or things of value given from Mr. Williams to the McDonnells?

MR. BROWNLEE: Objection, Your Honor.

THE COURT: Overruled.

A No, I did not.

MR. FAULCONER: One moment, Your Honor.

(Counsel conferring with co-counsel.)

MR. FAULCONER: No further questions, Your Honor.

THE COURT: All right. Cross?

CROSS-EXAMINATION

BY MR BROWNLEE:

Q Good afternoon, Ms. Krueger. My name is John Brownlee, and I represent Bob McDonnell. I've got a few questions for you here today. Thank you.

MR. BROWNLEE: If we can begin with 267, Government's Exhibit 267.

BY MR. BROWNLEE:

Q This is this pros and cons that you've testified you prepared. Now, government counsel asked you, on the cons, it says, "Political pressure from Governor and impact on future UVA requests from Governor."

You never spoke with Bob McDonnell about Star or Rock Creek; isn't that correct?

A That is correct.

Q Okay. So whatever you're referring to here, it didn't come from this man, right?

A That is correct.

Q Okay

MR. BROWNLEE: All right. You can take that down.

* * *

[Page 2777]

Q Krueger. I apologize. Ms. Krueger, you testified that you—at some point you decided to do some due diligence and you went on I think the Star website, or somewhere, and pulled this photograph?

A I pulled it off of Facebook.

Q Off the Facebook. Okay. And you said that in seeing this photograph, that influenced one of your later statements that you thought he supported this product; is that correct?

A That is correct.

Q Okay. Were you aware that this picture went through the channels in the Office of the Governor and was actually approved by staff to be released?

A No, I do not.

Q Okay. All right.

MR. BROWNLEE: We can take that down.

* * *

APPENDIX R

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA,
Plaintiff;

v.

ROBERT F McDONNELL and
MAUREEN G. McDONNELL,
Defendants.

Criminal Action
3:14CR12

August 21, 2014
Richmond, Virginia
9:45 a.m.

JURY TRIAL VOLUME XIX

BEFORE: HONORABLE JAMES R. SPENCER
United States District Judge

APPEARANCES: MICHAEL S. DRY, ESQ.
DAVID V HARBACH, II, ESQ.
JESSICA D. ABER, ESQ.
RYAN S. FAULCONER, ESQ.
RICHARD D. COOKE, ESQ.
Counsel for Government;

JOHN L. BROWNLEE, ESQ.

HENRY W. ASBILL, ESQ.
DANIEL I. SMALL, ESQ.
JAMES M. BURNHAM
CHRISTOPHER M. IAQUINTO, ESQ.
TIMOTHY J. TAYLOR, ESQ.
Counsel for Robert F. McDonnell;

WILLIAM A. BURCK, ESQ.
HEATHER H. MARTIN, ESQ.
STEPHEN M. HAUSS, ESQ.
DANIEL KOFFMANN, ESQ.
Counsel for Maureen G. McDonnell.

JEFFREY B. KULL
OFFICIAL COURT REPORTER

* * *

[Page 4301]

ROBERT F. McDONNELL,

a defendant herein, called as a witness by and on his own behalf, having been first duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ASBILL:

* * *

[Page 4468]

Q And who else was on the plane with you and the VSP person and Mr. Williams, aside from the pilots?

A I think that was it, coming back.

Q Just the three of you?

A Yes. That's my recollection.

Q And did you—so that takes, what, five hours or so?

A Well, it was about six. I think we had a couple of refueling stops. So I think it was about six hours coming back.

Q All right. And during that trip, did you talk with Mr. Williams?

A Extensively.

Q Were you talking to him or was he talking to you or both?

A I think I did a lot more listening on that trip.

Q And, in general, what was he talking about?

A Well, again, I had only had a chance to meet him that one time before in New York about ten months earlier. And it was typical. Every time I'd fly on a plane with a donor, I'd say half the time, or so, there would be a donor or a representative of the company on the plane, and they'd typically talk about their business.

So Mr. Williams, we exchanged some pleasantries, talked a little bit more about our families and so forth and backgrounds. But he started—he actually had a PowerPoint, I think, with documents, and he started to run through some of the things about his company, but particularly focusing on the fact that he and his researchers were focusing on a product in the tobacco plant called anatabine. The nicotine and others were sort of the bad things, and they had isolated anatabine. And his company was now looking at moving from tobacco and smokeless tobacco products into sort of the medical healthcare area, and he was doing a lot of work on this anatabine compound.

Q All right. And you say this kind of conversation, essentially, not necessarily on anatabine, but in general with respect to donors and they're being on planes with you, was common in your experience?

A Oh, yeah. During—whether it was during the campaigns or during my time as Attorney General, especially as Governor, when I'd fly on a private plane, I'd say at least half the time there was a representative of the company on there. Sometimes it was the owner. Sometimes the owner was the pilot. People like John Rocovich or Wayne McLeskey, people like that would actually fly the plane and they

were the owners. People like—some companies like Dominion had a policy that they wouldn't even let you go on the plane unless there was a company representative on there. Of course, we'd talk about their issues. So there was—people did that as a matter of routine.

Q Did Mr. Williams talk about his own background and his sort of life story or business experience?

A A little bit. I knew he had had a 20-, 30-year career in medical—the medical area. He talked me about VISX that he had helped to found, in refractive surgery. back the late '80s, and he made a lot of money in selling that business. He, I think, told me a little bit about his early days in Fredericksburg when he was in the automotive business. It was a little bit of a get to know you, because I really hadn't had that much time yet to know his story.

But he clearly had PowerPoint or a series of documents that he took me through about the anatabine plant, some research that was going on I think he said at Hopkins and maybe Roskamp at the time. And I remember him specifically talking to me about—he knew I had—well, he learned on the plane I had a medical background being a Medical Service Corps Officer in the Army, and then working for American Hospital Supply. So I think he understood I learned a—knew a little bit about this. And he talked about this C-reactive protein.

Q What's that?

A Well, it's a marker that—in your blood that measures a particular level that's related to tissue and system inflammation; that if you can reduce

C-reactive protein, you reduce inflammation, and therefore, you reduce a lot of systemic, chronic, negative things that could happen in somebody's body.

So it was actually—the science was interesting. I understood at least some of it. And he was kind of marching through his exhibits. And we had six hours on the plane so we had a lot of time to talk about it. And so it was actually a fairly—it was a pretty interesting discussion, for the most part.

Q Was the C-reactive protein issue one that was—that's personal to you as well?

A I remember it because I had had a couple of full—full lab analyses done of my own because of just some of my own issues, medical issues. And so I knew that marker from—I think, actually, Health Diagnostic Laboratories had done a marker for me. And I knew a little bit about that particular marker, and he said that that would reduce that level in your blood.

Q Okay. Did you all talk about your families?

A We did some. I mean, I got to learn he had four children, that we got married about the same year, we're the same age, and that—talked to me a little bit about his wife, Celeste. But not as much as we did maybe at a later dinner together, but a lot of it was—he spent a lot of time about his business. And I did have—I did take a nap because it was a long trip.

Q Did he talk to you about Bar Harbor, Maine, at all?

A I don't think then. I think that was at the dinner we had at the Mansion later on.

Q And what was the—what was the issue—

A We both—we had both honeymooned at Bar Harbor, Maine, my wife and I, in '76. And I think a year—he was '76 or '77, but at some point he told me that. So, I mean, it was just—we had some common connections with our honeymoon, the number of kids. There were just some things that were interesting about him, about the same age.

Q Did Mr. Williams ask you for anything on that plane trip?

A I don't remember an ask. I do just remember telling him at the end, though, you know, his story was interesting and that I'd be glad to refer him to Dr. Hazel. I don't remember if I volunteered or whether he asked. But in any event, at the end of the trip, I told him he ought to go see Dr. Hazel. He was the Secretary of Health and Human Resources.

Q And why did you think that would be appropriate

A Well, he clearly had something that he thought could help grow a Virginia business. It could create jobs. It could be—maybe do research in Virginia. And Dr. Hazel was probably the only one on my staff that would really fully understand all of the things that he was talking about because he was a physician and he was in charge of health and human resources.

* * *

APPENDIX S

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA,
Plaintiff;

v.

ROBERT F McDONNELL and
MAUREEN G. McDONNELL,
Defendants.

Criminal Action
3:14CR12

August 28, 2014
Richmond, Virginia
10:00 a.m.

JURY TRIAL VOLUME XXIV

BEFORE: HONORABLE JAMES R. SPENCER
United States District Judge

APPEARANCES: MICHAEL S. DRY, ESQ.
DAVID V HARBACH, II, ESQ.
JESSICA D. ABER, ESQ.
RYAN S. FAULCONER, ESQ.
RICHARD D. COOKE, ESQ.
Counsel for Government;

JOHN L. BROWNLEE, ESQ.
HENRY W. ASBILL, ESQ.

DANIEL I. SMALL, ESQ.
JAMES M. BURNHAM
CHRISTOPHER M. IAQUINTO, ESQ.
TIMOTHY J. TAYLOR, ESQ.
Counsel for Robert F McDonnell;

WILLIAM A. BURCK, ESQ.
HEATHER H. MARTIN, ESQ.
STEPHEN M. HAUSS, ESQ.
DANIEL KOFFMANN, ESQ.
Counsel for Maureen G. McDonnell.

JEFFREY B. KULL
OFFICIAL COURT REPORTER

* * *

[Page 5766]

MR. FRANCISCO:

* * *

Your Honor, I'd like to turn to Instruction Number 32 now. And I'll talk for maybe just a slight bit longer on this because this is an objection that I would like to make that applies to a series of the Court's instructions. And these are all of the Court's instructions that essentially touch upon bribery. And under the honest services fraud instruction, it encompasses the Court's Instructions 32 through 39, which we believe should be replaced with the defense Instructions 55 through 61. And as to Hobbs Act extortion, it covers the Court's proposed Instructions 48 through 51, which we believe should be replaced with defense Instructions 72 through 79.

Now, the arguments I'm going to make will be familiar to you so I will not make them at great length, but I will make them in order to preserve the record on what we consider to be the critical issue in this case.

We think that the Court's instructions, as written, have two fundamental errors in it. The first is that it relies on an impermissible and inappropriate definition of "official act" in that it would allow the jury to convict based on conduct that does not rise to the level of actual government power; that is, a promise to exercise the actual regulatory power of the state in exchange for payments.

Instead, the instructions would allow the jury to convict solely on the basis of a settled practice, even if that settled practice did not otherwise rise to the

level of an official act. We think that's contrary to JEFFERSON, which made clear that not all settled practices are official acts, only some category of them are if they otherwise involve the exercise of government power.

We think it also would allow the jury to convict based on things as innocuous as arranging a meeting, which, again, we do not believe involves an exercise of governmental power and, therefore, does not rise to the level of an official act.

And under this instruction, Your Honor, we believe that the statute at issue here is unconstitutionally vague. So that's the first objection to this set of instructions.

The second is that we also think that it misunderstands, or misdefines at least, what it means to be in quid pro quo bribery.

May I have one quick moment?

THE COURT: Uh-huh.

(Counsel conferring with co-counsel.)

MR. FRANCISCO: Your Honor, on this issue, we would refer the Court to the Fourth Circuit's decision in the JENNINGS case, which makes very clear that in order for there to be quid pro quo bribery, there has to be an exchange of payments—a payment made in exchange for a promise to perform a specific official act.

In the JENNINGS case, the Court actually found an instruction was invalid precisely because it did not require payment in exchange for a specific official act, but instead, erroneously would have permitted a conviction based on a promise to perform some

unspecified act in the future. And that is at 160 F.3d 1006, Page 1,022.

And if I could just read from the Court's opinion very briefly where it found the bribery instruction erroneous because it failed to—and here I'm quoting—"state that Jennings must have given money to Morris in exchange for some specific official act or course of action" and allowed conviction based on—that was the end of the quote, "specific course of action." And then it continues to say that it allowed conviction based on, quote, a vague expectation of some future benefit.

We think that the instructions here suffer from the very same problem. We think that those problems would be cured if you were to substitute in—in the instructions we've proposed on these issues, particularly 55 through 61 on honest services fraud, and more specifically 58, which defines an official act for honest services fraud, and Instructions 37 and 59, which define corruptly for purposes of honest services fraud. Those instructions contain the proper language that reflects JENNINGS, that reflects JEFFERSON, and the meaning of an official act.

On the Hobbs Act extortion, we think that you ought to replace your instructions—your instructions with our Instructions 72 through 79, and especially Instruction 76, which defines the misuse of official office, and instruction 77, which defines an official act.

If Your Honor is not inclined to add our instructions, we would ask that you include, in the current instructions for both wire fraud and Hobbs Act extortion, the following language, and it's two

short paragraphs that I will read into the record with Your Honor's permission.

"To convict the defendant, the official must have received the payment in exchange for performing or promising to perform some specific official act. A gift or payment given with the generalized hope of some unspecified future benefit is not a bribe. You may convict the defendant only if you find that he received something of value in exchange for performing or promising to perform some specific official act.

And then there would be a second paragraph that reads, "And providing mere credibility or a reputational benefit to another is not an official act. To find an official act, the questions you must decide are both whether the charged conduct constitutes a settled practice and whether that conduct was intended to or did, in fact, influence a specific official decision the government actually makes."

So we would—we would request that the Court replace its instructions, its proposed instructions with our proposed instructions on these elements. If the Court overrules that objection, then we would ask that this language be—be included in order to render these instructions legally proper.

Thank you, Your Honor, for your indulgence on that.

Now, on other instructions, with the Court's permission, I will simply reference that argument rather than remake it again.

THE COURT: All right.

MR. FRANCISCO: So sticking with Instruction Number 32, now I will move to more specific objections than the broad-based ones that I've made.

We think this objection(sic) is legally erroneous because it suggests that the absence of an official act is irrelevant when it says that you can convict even if there was no official act actually performed. That is not true. We think the absence of official act is clearly relevant to determine—relevant and probative of whether there was a conspiracy—whether there was a substantive offensive bribery in the first place.

If no official act was ever committed, that is certainly something that the jury could consider in deciding whether or not to conclude that there was a corrupt scheme here. We would, therefore, ask that—ask that that language be stricken, the language—and this is the one that the government edited. But I think it's the second paragraph of that instruction that focuses on what the government is not required to do. We think that language should be deleted as legally erroneous since it erroneously suggests that an official act is irrelevant.

If, however, the Court believes that it ought to stick with that instruction, we'd ask that it add the following sentence to the very end of the instruction. "If you find that no official action was taken by the official, then you may consider that as evidence that there was no quid pro quo."

Turning, Your Honor, to Instruction Number 33. We object to this instruction for the same reasons I just articulated. And for those reasons, we think it's legally erroneous. In addition, we think that it misdefines corrupt intent. Another portion of the JENNINGS opinion that I just discussed specifically talks about corrupt intent and uses the same language to say that "corrupt intent requires an

exchange of payment in exchange for specific official acts." Not some generalized hope of unspecified future acts. Our instruction D-59 we believe correctly defines the corruptly element here and takes into account the JENNINGS case.

We also strongly disagree with the government's proposed changes to this instruction. We think that the corruptly element does require the Court—the jury to find the language at the end, "accomplishing an unlawful end or unlawful result by any unlawful method," or it means the language that the government seeks stricken. This is a specific intent crime. We think it's also a willful crime as part of specific intent, and that language is exactly correct and should be maintained.

In all fairness, I haven't had a chance to review the JEFFERSON instruction. I did review—so I'm not sure what exactly it includes or doesn't include. I would note that the one that I did review just a minute ago on a different one of their objections, I think, went a lot—didn't go nearly as far as what the government was suggesting in that. So we would ask that in lieu of this

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[Page 5779]

Instruction Number 38, the definition of an official act. This was really at the core of the objection that I was raising earlier, and so we reiterate that objection to this definition and ask that it be replaced with defense Instruction Number 58. If the Court is inclined to include something along the lines of these instructions, we would ask that the last sentence be deleted. We are aware of no basis for that last sentence. It certainly doesn't come out of

JEFFERSON and, I don't believe, is consistent with the JEFFERSON instruction, and including it is, in our view, legally erroneous.

We'd also ask that the two sentences—let me amend what I just said, Your Honor. We'd ask that the last two sentences be deleted, particularly the very last sentence which has no basis in anything that we can find, but also the sentence that immediately precedes it. Again, we think that erroneously states the law, and it tilts the instruction too heavily in favor of the government's position.

But if the Court is inclined to include that instruction, along with the government's language, we would ask that you add to this instruction the two paragraphs that I read at the beginning when I started making the broad objection to this. I could read it again, or I could—would you like me to?

THE COURT: No. There's no need.

* * *

[Page 5798]

MR. FRANCISCO:

* * *

Our further proposed instruction is unanimity on official acts. Here, Your Honor, it's not at all clear what the government believes the specific official acts charged in the indictment are. It is, therefore, a very real possibility to that the jurors will not agree on this critical element, in which case Mr. McDonnell could be convicted even though there was no unanimity on which official acts he allegedly promised to engage in in exchange for payments. We, therefore, think that an instruction on the unanimity on official acts is necessary to ensure that the jury

reaches unanimity on the central element of the offenses charged in this case. We've cited the case law that we believe supports this and would ask that an unanimity on official acts instruction be included.

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APPENDIX T

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA,
Plaintiff;

v.

Criminal Action
3:14CR12

ROBERT F McDONNELL and
MAUREEN G. McDONNELL,
Defendants.

August 29, 2014
Richmond, Virginia
9:30 a.m.

JURY TRIAL - VOLUME XXV

BEFORE: HONORABLE JAMES R. SPENCER
United States District Judge

APPEARANCES: MICHAEL S. DRY, ESQ.
DAVID V HARBACH, II, ESQ.
JESSICA D. ABER, ESQ.
RYAN S. FAULCONER, ESQ.
RICHARD D. COOKE, ESQ.
Counsel for Government;

JOHN L. BROWNLEE, ESQ.
HENRY W. ASBILL, ESQ.
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CHRISTOPHER M. IAQUINTO, ESQ.
TIMOTHY J. TAYLOR, ESQ.
Counsel for Robert F McDonnell;

WILLIAM A. BURCK, ESQ.
HEATHER H. MARTIN, ESQ.
STEPHEN M. HAUSS, ESQ.
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Counsel for Maureen G. McDonnell

JEFFREY B. KULL
OFFICIAL COURT REPORTER

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[Page 5817]

MR. HARBACH:

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[Page 5843]

And this wasn't some ceremonial event without context or some event with no purpose. Hosting this event at the Mansion and all that went with it is what mattered most to Jonnie Williams and Paul Perito and Star. And what mattered most of all was that Mr. McDonnell showed up. He made time to attend. He arrived, he made remarks, he talked glowingly about Star. He asked questions. He was engaged. It was delightful. And Jonnie Williams was on Cloud 9. This is exactly what he wanted. This is exactly what he was paying for.

He testified he wanted Mr. McDonnell there because, quoting, "It sends a signal to those medical schools that this is important. The credibility associated with it." End quote. And if there is any question about what Mr. Perito called the halo effect, or what Jonnie Williams called credibility, that comes from an event like this, let's pause for a moment and think about what it was like from the perspective of the people who mattered to Mr. Williams, the UVA and VCU doctors who were there. Both Dr. Lazo and Dr. Clore were state employees. They were people way down the food chain from Mr. McDonnell. And they told you that when they saw that invitation with the name on it and the seal on it, it seemed official to them.

And then think about what they did after it was over. Dr. Clore promptly told his colleagues all about

it when he got back to VCU. And Dr. Lazo, who was the one from UVA, he didn't even wait until he got back to Charlottesville. He called his higher-ups at UVA from the car and told them that he had just met the Governor at the Mansion. And when he got back, he did the same thing, told the Dean of the School of Medicine, and later a panel of fellow researchers.

* * *

[Page 5865]

Now, before we go on to illustrate how valuable it was to get invited to this event, let's take a brief look at who didn't get invited.

* * *

[Page 5867]

Two weeks later, March 21st of '12, Mr. McDonnell is in a meeting with his Secretary of Administration, Lisa Hicks-Thomas, and one of her subordinates, Sara Wilson. And they both testified here. And the subject of their meeting is a consumer-driven healthcare plan for employees, which, among other things, specified which drugs could and could not be used as part of the plan. During the meeting, in the midst of this discussion about the employee health plan, Mr. McDonnell pulls out a bottle of Anatabloc, talks about how great it is, and how it would be good for State employees.

Now, depending on whose memory is correct about this, either the Governor asked them to meet with Star personnel, that's what Ms. Hicks-Thomas said, or gave Ms. Hicks-Thomas the strong impression that he wanted to meet with Star. That's what Ms.

Wilson said. Either way, according to Sara Wilson, she had never seen anything like this before.

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[Page 5869]

Another little detour here, please. A brief word about all the things we keep hearing about that Mr. McDonnell didn't do. As I noted earlier, we don't even have to prove that he did any official acts so long as we prove the corrupt agreement. Of course, Mr. McDonnell did plenty. and you all have heard about all that. We expect you'll hear from the Court in the instructions that official action includes actions that have been clearly established by settled practice as a part of a public official's position.

Now, all of these things, the launch at the Mansion, directing Dr. Hazel to send somebody to the meeting in August of 2011, the effort to pressure VCU and UVA on Star's behalf that Jasen Eige shut down, the Virginia Healthcare Leaders event at the Mansion, Mr. McDonnell meeting with Lisa Hicks-Thomas and Sara Wilson, asking them to reach out to the Star people, or strongly suggesting as much, all of these are officials acts on the issue of Virginia business development, which everyone who testified about it said was a capital priority of Bob McDonnell's administration.

Mr. McDonnell's involvement with every single one of these things was in his official capacity as Governor, whether it was approving the Mansion event, which Dr. Scarbrough and Mr. Kent both said were ultimately approved by him, or directing conduct by a subordinate. Whatever it was, it's all official action. So the fact that Mr. McDonnell didn't

order a dispensation from the Governor's Opportunity Fund or to Star, and he didn't put a line item in the budget for the studies that Mr. Williams wanted, that's like saying a guy who steals a TV isn't guilty because he didn't steal two. Not a defense.

What separates the official action in this case from all the other times that Mr. McDonnell had done similar things is what makes the defendants here guilty. They got paid for them. We've heard several times during this trial that no one had to pay Mr. McDonnell to get anything. The easiest thing to get out of Mr. McDonnell was a kind word about Virginia business. You've seen all those—all the photos, 400-and-some photos the defense put in evidence of making comments at different ribbon cuttings and so forth. I passed along the information to Dr. Hazel just like I had done hundreds of times before.

But as we expect you will hear from the Court's instructions on the law, the government need not prove that the bribe caused the public official to change his position. We don't have to prove that. He could have gotten—he could have done exactly as he would have done anyway. He could have done exactly as he had done hundreds of times before. And if he takes official acts in exchange for money, it's a crime. The question isn't whether Jonnie Williams had to pay Bob McDonnell to get anything. The question is whether Jonnie Williams did pay Bob McDonnell to get anything, and the evidence is overwhelming that he did.

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[Page 6037]

THE COURT: All right. Government.

MR. DRY: Thank you, Your Honor.

Good afternoon, ladies and gentlemen.

THE JURY: Good afternoon.

MR. DRY: At the end of the day, the evidence and your common sense makes it clear that Mr. and Ms. McDonnell accepted bribes from Jonnie Williams.

* * *

[Page 6039]

Now, Mr. Asbill talked about defining quo. Okay. And what he didn't do is talk about the full definition that you're going to receive. He talked about any question, matter, cause, suit, proceeding, or controversy. He talked about bills and board appointments and all of this. But what he failed to mention is that official action, as the judge is going to instruct you, includes those actions that have been clearly established by settled practice as part of a public official's position even if the action was not taken pursuant to responsibilities explicitly assigned by law.

In other words, official actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule or job description. In addition, action can be include actions taken in furtherance of longer term goals, and an official action is no less official because it is one in a series of steps to exercise, influence, or achieve an end.

Mr. Asbill argues there is no quo. But ladies and gentlemen, if you apply the law to what happened in this case, there is more than sufficient quo. Even though the government doesn't have to prove there

was any quo, we just have to prove the corrupt agreement. But let's—let's go down some of these things for a moment.

First of all, directing Dr. Hazel to send someone to the meeting in August of 2011. Now, when he was on that witness stand, Mr. McDonnell said, "Well, I did that because I was concerned and I didn't want any decisions made without having a subject matter expert." We've been talking for five weeks, ladies and gentlemen, and one fact is perfectly clear. Ms. McDonnell is not a public official. She has no decision-making authority. Well, if she doesn't have any decision-making authority, why are you sending government officials to sit in on a meeting between Mr. Williams and Ms. McDonnell? That's not what was going on, ladies and gentlemen. Jonnie Williams wanted to meet with somebody from the Health and Human Resources, and he got that meeting.

Now let's go to the August 30th launch at the Mansion. Mr. Asbill said that Mr. McDonnell just didn't know what this was about. But ladies and gentlemen, that briefing sheet he got the day before, that made it clear what this was about. It's got Star Scientific people there. It's got the UVA and VCU researchers there. Mr. Williams made it clear what he wanted. That's the June 16th letter. Mr. Asbill said, "Well, he got no response." He got a response. It was that August 30th Mansion event launch.

Now, the third, the Governor's attempt to get involved with the VCU and UVA sites. This is the six-minute e-mail exchange. I'm not going to beat that to death. But at the end of the day, ladies and gentlemen, it's clear that Mr. McDonnell was e-

mailing his policy director after receiving e-mails from Ms. McDonnell talking about what, UVA, VCU, Anatabloc studies. What did Mr. Williams want? That. And what is Mr. McDonnell doing at the same time, they are negotiating another $50,000? He's e-mailing. He's doing something.

Now, let's go to the Virginia Healthcare Leaders event at the Mansion. Ladies and gentlemen, you saw the handwritten notes. You saw what was going on. There is no way that Mr. McDonnell didn't know, when he was going to that event, that Ms. McDonnell had basically blessed Mr. Williams inviting who he wanted.

Now, in the closing statements, they made it sound like Ms. McDonnell was choosing who she thought was the healthcare leader of Virginia. That wasn't Ms. McDonnell. Jonnie Williams got carte blanche to make those decisions. And don't forget. Mr. Ladenson got directed there.

When you go back into that jury room, you pick up those pictures. And you can just kind of flip through them, and you see exactly what happened there. You see Jonnie Williams next to the pillar. He's got that look on his face like a cat just ate the canary. And then you see Mr. and Ms. McDonnell next to each other. And the next picture, you see everybody looking at Mr. Ladenson because Mr. McDonnell had singled him out.

Now, as far as the meeting with Lisa Hicks-Thomas and Sara Wilson, I think that Mr. Asbill said it happened on March 19th. I think it's actually March 21st. But setting that aside, he said that nothing came out of it. But, ladies and gentlemen,

that's not the point. The Governor of Virginia is pulling out a product and talking to his senior advisors in a meeting about lowering healthcare costs in Virginia. He's saying, "You should meet with them." Now, the fact that that meeting didn't occur, like pretty much everything else in this case, that wasn't because of Mr. McDonnell. That was in spite of Mr. McDonnell.

You know, we don't have to prove any one of those, but any one of those is sufficient. They keep on talking about no one was pressured. When you get these jury instructions, ladies and gentlemen, you look for the word pressure. It doesn't appear anywhere. But ladies and gentlemen, when your boss is telling you to do something, when the man who is the ultimate boss for 110,000 people tells you to do something, he doesn't need to yell. He doesn't need to scream. No. Absolutely not.

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[Page 6044]

Ladies and gentlemen, there is no doubt about the quid in this case. There's no doubt about the quo in this case. And I'd like to talk a little bit about the pro.

Well, first of all, on that Hazel point I just said. I said that Mr. Hazel proved there was something special. Under the law, if Star got exactly what every other company got and Mr. McDonnell and Ms. McDonnell took bribe payments for that, that's still illegal. Do you remember all 400 of those pictures that they put in towards the end of the case that showed Mr. McDonnell up at function after function after function? Well, there's nothing wrong with that,

ladies and gentlemen. That's his job. He just can't pocket money, personal money, for doing his job.

The law doesn't allow him to do that.

As far as the pro. We've been very up-front with you from day one, ladies and gentlemen. There is no express agreement in this case. There is no videotape of it. There's no e-mail that says, "Hey, you give me this, $50,000, and I'll set up this meeting." That just didn't happen. But the Court is going to instruct you that the agreement does not need to be express. And it's going to tell you that the reason for that is that otherwise, quote, the law could be frustrated by knowing winks and nods, end quote.

Ladies and gentlemen, nobody has accused the defendants or Jonnie Williams of being stupid. Nobody. And we all know that those kinds of explicit agreements just don't happen in the real world. The Court is going to instruct you that the agreement can be established based on the defendant's words, conduct, acts, and all the surrounding circumstances, as well as the logical inferences that may be drawn from them.

Ladies and gentlemen, Mr. Williams was sitting in that Mansion at the events and getting those meetings because he was paying for it. He was paying for it. And if you have any doubt about that, the timing of the events makes it absolutely clear that the defendants and Mr. Williams had a corrupt agreement. You don't need to take Mr. Williams' word for it.

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[Page 6047]

Think about this. The same day that Mr. McDonnell calls Mr. Williams to negotiate another $50,000 loan, Star representatives are e-mailing Ms. McDonnell with a list of guests for the Healthcare Leaders Reception. The best evidence in the case is the six-minute e-mail exchange. Mr. McDonnell's attorneys have suggested, well, he just sends a lot of e-mails at night. But his own testimony makes it clear that he sent these late-night e-mails for things —can we show up Government's Exhibit 901, please.

This was the question that Mr. Asbill asked on direct. "Okay. And would you typically send a lot of e-mails late at night? Yes. Very often. That was my time to think about things for the next day and think about things that I wanted to have done." That's right, ladies and gentlemen. That e-mail to Mr. Eige. That was about something that Mr. McDonnell wanted to have done.

The Healthcare Leaders Reception itself occurs five hours after Mr. Williams and Mr. McDonnell have a private meeting about the loan.

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APPENDIX U

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA,
Plaintiff;

v.

Criminal Action
3:14CR12

ROBERT F. McDONNELL and
MAUREEN G. McDONNELL,
Defendants.

September 2, 2014
Richmond, Virginia
9:45 a.m.

JURY TRIAL—VOLUME XXVI

BEFORE: HONORABLE JAMES R. SPENCER
United States District Judge

APPEARANCES: MICHAEL S. DRY, ESQ.
DAVID V HARBACH, II, ESQ.
JESSICA D. ABER, ESQ.
RYAN S. FAULCONER, ESQ.
RICHARD D. COOKE, ESQ.
Counsel for Government;

JOHN L. BROWNLEE, ESQ.
HENRY W. ASBILL, ESQ.

DANIEL I. SMALL, ESQ.
JAMES M. BURNHAM
CHRISTOPHER M. IAQUINTO, ESQ.
TIMOTHY J. TAYLOR, ESQ.
Counsel for Robert F McDonnell;

WILLIAM A. BURCK, ESQ.
HEATHER H. MARTIN, ESQ.
STEPHEN M. HAUSS, ESQ.
DANIEL KOFFMANN, ESQ.
Counsel for Maureen G. McDonnell.

JEFFREY B. KULL
OFFICIAL COURT REPORTER

* * *

[Page 6075]

THE COURT:

* * *

[Page 6100]

Additionally, a defendant need not be a public official to be guilty of this offense. A private citizen, for instance, does not owe a duty of honest services to the public, but can be found guilty of honest services fraud if that defendant devises or participates in a bribery scheme intended to deprive the public of its right to a public official's honest services.

Now, a definition of this term bribery that you've heard a number of times. Bribery involves the exchange of a thing or things of value for official action by a public official. In other words, a quid pro quo. You've heard that phrase, the Latin phrase, meaning "this for that" or "these for those." Bribery means that a public official demanded, sought or received something of value as described in the indictment and that the public official demanded, sought or received the item of value corruptly in return for being influenced in the performance of any official act. Bribery also includes a public official's solicitation or agreement to accept a thing of value in exchange for official action whether or not the payor actually provides the thing of value and whether or not the public official ultimately performs the requested official action or intends to do so. Thus, it is not necessary that the scheme actually succeeded or that any official action was taken by the public official in the course of the scheme. What the government must prove is that the defendant you are

considering knowingly devised and participated in a scheme or artifice to defraud the public and the government of their right to a public official's honest services through bribery.

Corruptly means having an improper motive or purpose. An act is done corruptly if it is performed knowingly and dishonestly for a wrongful purpose.

The public official and the payor need not state the quid pro quo in express terms. Otherwise, the law's effects—or effect could be frustrated by knowing winks and nods. Rather, the intent to exchange may be established by circumstantial evidence, based on the defendant's words, conduct, acts, and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them.

The thing of value in a bribery exchange need not be provided directly or indirectly to the public official, but may be provided to another person or entity at the public official's request or with the public official's agreement.

A public official need not have solicited or accepted the thing of value only in exchange for the performance of official action. If you find beyond a reasonable doubt that a public official solicited or received a thing of value at least in part in exchange for the performance of official action, then it makes no difference that the public official may also have had another lawful motive for soliciting or accepting the thing of value.

The government need not prove that the thing of value caused the public official to change his position. In other words, it is not a defense to claim that a

public official would have lawfully performed the official action in question anyway, regardless of the bribe. It is also not a defense that the official action was actually lawful, desirable, or even beneficial to the public. The offense of honest services fraud is not concerned with the wisdom or results of the public official's decisions or actions, but rather with the manner in which the public official makes his or her decisions or takes his or her actions.

Now, you've heard this term official action several times, and I will define it for you. The term official action means any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such public official's official capacity. Official action as I just defined it includes those actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law. In other words, official actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description. And a public official need not have actual or final authority over the end result sought by a bribe payor so long as the alleged bribe payor reasonably believes that the public official had influence, power or authority over a means to the end sought by the bribe payor. In addition, official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.

* * *

[Page 6125]

The government has produced testimony relating to Mr. McDonnell's compliance with Virginia's gift and disclosure laws. You may not consider that testimony as evidence that Mr. McDonnell violated Virginia law by failing to report certain gifts and loans on his annual Statement of Economic Interests. There has been no suggestion in this case that Mr. McDonnell violated Virginia law.

* * *